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The Office of The Sheriff

by Gordon Turriff
and
Elizabeth Edinger

A Study Paper Prepared for
the Law Reform Commission of British Columbia
with Financial Assistance from
the Law Foundation of British Columbia

MINISTRY OF ATTORNEY GENERAL

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> ". . . the more it is searched into
> and understood, the more it is
> sure to be valued."
>
> 3 Bl. Com. 350

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INTRODUCTORY NOTE

This study paper describes an important Provincial institution: the office of the sheriff. It was commissioned in 1980 with a view to producing a document which would illuminate the history and work of the office and which would provide assistance and guidance to those concerned with its operation.

In the paper the authors identify certain problems and suggest solutions to them. The solutions proposed may be helpful to the Legislature and to those responsible for the administration of sheriff services in this Province. They are, however, solely those of the authors and should not be regarded as recommendations of the Law Reform Commission of British Columbia.

The Commission wishes to express its appreciation to Mr. Registrar Turriff and Professor Edinger for the time and skill they have devoted to this study. The Commission also wishes to acknowledge the role of the Law Foundation of British Columbia which provided major financial support for this study.

Mr. Justice J. S. Aikins
Justice of Appeal of the Court
of Appeal for British Columbia
Chairman, Law Reform Commission
of British Columbia

PREFACE

A good deal more time was spent preparing this paper than was intended when the project was first undertaken. This is so because the subject was found to have been much larger than was anticipated. The size of the project explains part of the delay in its publication. The other part is explained by my assumption, in July 1981, of the duties of District Registrar of the Supreme Court of British Columbia at Vancouver. Because of that appointment, I have had little time to devote myself to sheriff law and for that reason Professor Edinger was invited by the Commission to write Chapter VII, that part of the paper concerned with execution proceedings. I should say that the parts of Chapter VIII about service of process and juries remain mere outlines of subjects which demand closer attention than I was able to give them. An important matter excluded by the pressure of time is a discussion of the sheriff's responsibility to arrest ships.

I would be remiss if I did not acknowledge the prompt and kind assistance which I received from so many people while preparing this paper. They are too numerous to list individually but the extent of the assistance I received may be measured by the places from which the help came: all the Provinces of Canada, all the States and both Territories of Australia, New Zealand, South Africa, England, Scotland and France.

I wish to thank Chief Justice A. McEachern for relieving me of some of my duties so that the project could be completed. I also wish to thank Mr. Justice J.S. Aikins, Chairman of the Law Reform Commission of British Columbia, for his wise counsel and his patience, and Arthur Close (Vice Chairman), Anthony J. Spence (formerly Counsel to the Commission) and Sharon St. Michael (Secretary to the Commission) for their unfailing help. I wish especially to thank Terry Lesperance for her cheerful attention to the manuscript. Her work was always quickly and carefully done and made my job much easier. Finally, I wish to express my appreciation to Anne Shields who assisted with the final editing of the paper and undertook the many tedious tasks associated with that process.

Of course I must not fail to acknowledge all the support my wife, Ellen Gerber, has given me throughout.

It should go without saying that the views expressed in this paper are mine and Professor Edinger's alone and that they should not be attributed to the Supreme Court of British Columbia or to any of its other officers.

Gordon Turriff

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CHAPTER I

THE NEED FOR A STUDY

Little need be said to explain the choice of the sheriff as a subject of study, if only because the office has always been under review. Scrutiny began, it seems, in 1076 when William the Conqueror ordered "the very first commission of inquiry" into sheriffs.[1] Later, in 1170, Henry II held an Inquest of Sheriffs.[2] In 1215, *Magna Carta* called for an "enquiry" into the "evil customs" of "sheriffs and their servants"[3] and later the same century much of the work of the Rag[e]man's Quest was concerned with what sheriffs did.[4] More recently and closer to home, in 1888 an inquiry into the office of sheriff was made by a select committee of the Legislative Assembly for British Columbia.[5] The same year, the House of Lords in England embarked on a similar investigation[6].

Despite regular efforts to bring reform, sheriffs have always been troublesome for one reason or another. There is, for example, abundant evidence of their consistent malpractice: statutes of Henry IV in 1404 and of Elizabeth in 1585 are two of many examples of corrective measures which were thought to have been necessary to control the officers.[7] In the first real compilation of sheriff law, published in 1623,[8] Dalton condemned "Under-sherifes and Officers" who "neglect the publicke" and "use much deceit."[9] Little changed over the centuries: in 1869 a lawyers' magazine continued the attacks on sheriffs' abusive and extortionate conduct.[10]

---

[1] *See* I. Gladwin, *The Sheriff: The Man and his Office* (1974) at 37. Complaints about the sheriffs' practices had been made in Anglo-Saxon times too: *see* T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956) at 101, and W.A. Morris, *The Medieval Sheriff to 1300* (1927) at 36.

[2] *See* W. Stubbs, 1 *The Constitutional History of England* (4th ed., 1883) at 510; and *see* Morris, *supra*, note 1 at 113, and Gladwin, *supra*, note 1 at 78–80.

[3] *See* cap. 48 of "The Text of Magna Carta 1215," trans. G.R.C. Davis, which is found as an Appendix in I. Jennings, *Magna Carta* (1965). At the time, "[n]o royal officer was more justly hated than the sheriff": *see* W.S. McKechnie, *Magna Carta* (2nd ed., 1914) at 311. And *see* Plucknett, *supra*, note 1 at 475: "The sheriffs themselves were not above reproach, but their underlings bore a thoroughly bad reputation in the middle ages." C. H. Karraker, in *The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and the Chesapeake Colonies 1607-1689*, (1930) at 19, considered "the chief defect in the sheriff's office" to be "the performance of most of its duties by irresponsible under-officials."

[4] The Quest took place in 1274-75: *see* Gladwin, *supra*, note 1 at 180; and *see* Morris, *supra*, note 1 at 183.

[5] *See Report of Select Committee Appointed to Enquire into the Procedure Governing the Office of Sheriff*, printed as an Appendix to (1888) 17 Journals of the Legislative Assembly of the Province of British Columbia 29:

> On the motion of Mr. *Martin*, seconded by Mr. *Fry*, it was *Resolved*. — That a Select Committee be appointed to enquire into the procedure which governs the office of Sheriff, and the remuneration of that office, and to suggest any legislation in respect of this office which may be deemed to be of advantage to the Province, with power to call for persons, books, and papers, such Committee to consist of Hon. *T. Davie*, *Mason*, *Bole*, *Fry*, and the mover.

The motion was made on 21 February. The Committee reported on 10 April (at 79), but it is not clear from the Journals whether any persons, books or papers were called for. The body of the Report (at lxvii) consisted of 11 printed lines, containing these recommendations:

> That the Province is at present divided into seven bailiwicks, or Sheriff's districts, and that the present division is not a convenient one.
>
> That the present system of paying Sheriffs, partly by fees and partly by salary, is very unsatisfactory, and we recommend to the favourable consideration of the Government that a different system be adopted, whereby the Sheriffs shall be paid fixed salaries and give adequate securities to the Treasury for all fees collected by them.
>
> Your Committee are of opinion that the bailiwicks should be made coterminous with the County Court Districts, as the same are defined in the "County Court Act, 1883," and that it would be less confusing if the bailiwicks were called counties.
>
> Your Committee also recommend to the consideration of the Government the appointment of Bailiffs, for the purpose of lessening the cost of the service of legal documents.

[6] *See Report from the Select Committee of the House of Lords on High Sheriffs* Cmd. 257 (1888).

[7] *See* 6 Henry IV, c. 3, in which sheriffs, among other officers, are said to "defraud and deceive our said Lord the King yearly in their unlawful and untrue accompt" and the preamble to 27 Eliz. I, c. 12 begins: "Forasmuch as grievous Complaints are many Times made of the Misdemeanour and evil Behaviour of Under-Sheriffs . . . ." Still, the sheriff of this period has had his defenders: *see, e.g.*, M. Blatcher, *The Court of King's Bench, 1450-1550* (1978) at 77.

[8] M. Dalton, *Officium Vicecomitum or The Office and Authoritie of Sherifs* (1623). In 1832, Lord Chief Tindal described Dalton as "an early writer of considerable authority:" *see* note (b) to the report of *Rex* v. *Pinney* (1832) 5 C.& P. 254, 264, 172 E.R. 962, 968. W.S. Holdsworth, in 4 *A History of English Law* (1956), at 119, said of Dalton's work: " . . . in spite of a growing number of rivals, it continued to be a standard authority till the beginning of the eighteenth century."

[9] Dalton explained in the Epistle preceding Folio 1, why he wrote the book:

> . . . that such as hereafter shall undergoe the place, may more fully understand themselves, and these things; and so may the better endevour to execute their said Office, according to their Oathes; whereby they shall the better performe their duties to GOD, their PRINCE, and their Countrey."

No complaints of oppression in the old sense at least[11] are made against sheriffs[12] in modern times. But there are frequent complaints of other kinds,[13] and for that reason alone a study of the office is timely.[14] Other reasons also justify an inquiry. One of those is that in British Columbia there is much variation in practice from place to place in what the deputy sheriffs do.[15] Practice varies because the deputies get limited guidance from their superior and from those who are available to help him about how they should discharge their responsibilities. The absence of proper direction might be explained by the surprising fact that apart from a practitioners' booklet published in England in 1968,[16] no new compilation of the law relating to the office of sheriff has appeared anywhere since 1894.[17] It follows that one purpose of this paper is to classify what the sheriff does and to provide a fresh statement of the law for the benefit of those who do the work.

There is another principal object. The death throughout the Commonwealth this century of the sheriff as entrepreneur and the rise of the public servant in his place[18] itself demands a modern inquiry. Thus, the questions are asked: how much of the old law touching the sheriff has survived this development and of that which remains, how much of it should be discarded as obsolete?[19]

---

[10] *See* Anon. "The High Sheriff" [1869] 5 Can. L.J. 58 at 59. It is significant that this comment on the state of things in England was reprinted in a Canadian publication. The problems as well as the office must have crossed the Atlantic. There have been improvements in England during the last century: *see Report of the [Payne] Committee on the Enforcement of Judgment Debts* Cmnd. 3909 (1969) at para. 658.

[11] It is not surprising that the medieval sheriff was alleged to be oppressive. He "farmed" his county from the king, paying an annual sum for the right to collect the royal accounts: *see* Morris, *supra*, note 1 at 63-4. *See also Mather on Sheriff and Execution Law* (3rd ed. 1935) at 3, and *see* F.W. Maitland, *Justice and Police* (1885) at 69, on the Norman sheriff: "The shire is let to him at a rent, and he makes what he can out of its administration." *See also* D. Boland, "The Ancient Office of Sheriff" (1951) 211 L.T. 177 at 178: "The sheriff again let to ferm to others the hundreds or liberties in his county . . . ." The practice of the sheriff "farming his farm" was prohibited by 23 Hen. 6, c. 9 (1444), and *see* W.S. Holdsworth, 1 *A History of English Law* (1956) at 6, and s. 19 (2) of the *Sheriffs Act, 1887*, 50 and 51 Vict. c. 55.

[12] For the sake of simplicity, and unless it is clear from the context that another meaning is intended, when "sheriff" is used in this paper it is meant to include anyone lawfully acting in his place, such as an under-sheriff, bailiff, deputy sheriff or sheriff's officer. Chapter III contains a discussion of the confusion which has arisen over the titles of some of the subordinates.

[13] *See, e.g.*, the remarks of Mr. Wallace in (1977) 4 *Debates of the Legislative Assembly for British Columbia*, at 2980 and of the Attorney General, the Hon. Mr. Gardom, at 2981. It is worth mentioning that in 1972 a special committee of the British Columbia Branch of the Canadian Bar Association recommended study of the "[o]rganization and efficiency of ancillary court offices and officers, including: (i) the Sheriffs, including whether the present organization by Counties, method of remuneration, recruitment, and efficiency are satisfactory . . . ." *See* Advocate reference. In 1979, the Civil Litigation Section of the same Branch collected complaints about the way in which execution was levied and process was served and on 7 February 1980 the Provincial Council of the Branch unanimously resolved to call on the Attorney General to deploy sufficient manpower on executions to ensure that the reasonable expectations of judgment creditors in the Province were met. The Vancouver division of the Criminal Justice Section of the Association complained not too long ago about the way in which jury panels were being returned by deputy sheriffs, suggesting that some panels were not representative of the community. This complaint was taken up by the director of sheriff services. In July 1980, he issued guidelines to the deputy sheriffs for the selection of prospective jurors. Those guidelines are discussed in Chapter VIII.

[14] This paper is not concerned with questions of efficiency *per se*. Those questions were addressed by others in 1976: *see Report of the Task Force on Sheriff Services* (1977).

[15] By way of contrast, the Under Sheriff of London, who is also Honorary Secretary of the Under Sheriffs Association, wrote that there " . . . are very few variations in practical procedures in the various counties of England and Wales." And that is in a country where the sheriffs are not public servants.

[16] C.H. Beaumont, *The Law Relating to Sheriffs and their Officers* (1968). It is now dated because of changes made by the *Courts Act, 1971* (England) 1971, c. 23.

[17] *See* P.E. Mather, *A Compendium of Sheriff Law* (1894). It was described by its author, at v, as a "good practical work for under-sheriffs and the legal profession generally." It was not a scholarly treatment of the subject. The third edition, which appeared in 1935 as *Mather on Sheriff and Execution Law*, is better if only because it contains an historical introduction. That introduction is the best short history of the office of sheriff to be found anywhere. W.H. Watson's book, *A Practical Treatise on the Office of Sheriff* (2nd ed., 1848), is a particularly useful source, although much of the work is dated and it has no list of cases. There are, of course, modern digests which are kept current but none of them puts all the law relating to the sheriff in one place. It is therefore a difficult and tedious job to bring the sheriff's duties together in a comprehensive and comprehensible way. No one has attempted this lately.

[18] The death and the rise are described in Chapter II. In theory, the sheriffs in England are still contractors, but more money is lost on the office than is made, although this is not to say that the undersheriffs cannot make a decent living: *see* Gladwin, *supra*, note 1 at 376-7 and *see* C. Churchill, *The Law of the Office and Duties of the Sheriff* (2nd ed., 1882) at 19, where it is said:

> it is clear that those appointed to the office of the sheriff should be persons of means and position, within the general acceptation of the term, as the functions and dignity of sheriff entail a considerable expenditure, for which no provision is made in the way of emolument, except in isolated instances, and in these the provision is entirely inadequate.

There is no particular dignity in the office or work of the sheriff in British Columbia today, although that need not be so.

At the heart of these questions and of this paper is a subtle and difficult problem to which immediate and close attention should be paid. This is the question of who should administer the work the sheriff does. It is neither a surprising nor an avoidable question in a discussion of sheriff law. To answer the question, it is necessary to put the office of sheriff in perspective. To do so is to do something which no one has ever really done before and the exercise may prove to be of some help even outside British Columbia.

Three main recommendations are made in the paper. First, it is recommended that the sheriff cease to be a Crown officer. Second, it is recommended that responsibility for the administration of all that the sheriff does be transferred from the government to the courts. And third, it is recommended that serious thought be given to re-introducing the entrepreneur sheriff.

If Lytton Strachey was right when he said that "ignorance is the first requisite of the historian,"[19] then this paper is a history. But it is a history of necessity only, and as a history of an institution in British Columbia it is simplistic and selective. If nothing else, the paper may prompt a real historian to take on work that has lain undone too long in this Province.

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[19] G. L. Strachey, *Eminent Victorians* (1918), (Penguin 1980) at 9

CHAPTER II

SOME BACKGROUND

Henry III (1216-1272) once ordered the sheriffs of London " . . . to provide a muzzle and iron chain for [his] white bear in the Tower of London and a rope 'long and strong' to hold him [presumably the bear, not the King] when fishing in the Thames."[1] In those days a command of that kind was not uncommon because the sheriff was "the personal agent as well as the official of the king."[2] He was a royal officer[3] — an "invaluable agent of the Crown"[4] — and had been one for close to 300 years.

The origin of the office of sheriff has been traced to the "half-century [actually 899-975] between the enactment of the laws of Edward the Elder and the death of Edgar,"[5] although first mention of an official having the title *scirgerefa*[6] was not made until the time of Canute (1016-1035)[7].

The Anglo-Saxon sheriff (to 1066, of course) had much to do. He:[8]

> . . . had custody of all the royal desmesnes within his shire; presided over the shire court in the absence of the earl (either with the bishop or alone); proclaimed and executed all the king's commands which he received by royal writ; preserved the king's peace by means of his power to arrest, to raise the 'hue and cry' and imprison felons; collected and accounted for all judicial fines, taxes and extraordinary fiscal levies; presided over the Hundred Court when touring his shire to inspect the 'tithing' groups; provided for the king's safety and necessities; exacted all services which were due to the Crown; raised and led the local fighting force (the fyrd); distributed alms; paid the wages of messengers, doorkeepers, etc. attached to the castle; seized the forfeited lands of traitors and other malefactors; carried out the king's orders for the alienation of Crown lands and enforced the numerous regulations connected with trade, currency, weights and measures, fairs and markets.

The range of duties which the sheriff was called upon to discharge before and for a century after the Norman Conquest is testimony to his importance as an official of the government of the kingdom: he was, it has been said, "without a rival within his shire."[9] But this prominence was short-lived, relatively speaking. The sheriff became "too powerful,"[10] even for the king whose man he was,[11] and "had passed the zenith of his power before the reign of John [1199-1216]."[12] The emergence of the itinerant justices[13] and the creation of the offices of coroner[14] and justice of the peace[15] brought checks on his authority, particularly his judicial authority, and his power was virtually emasculated during the fourteenth century by a series of statutes, the most important of which limited his tenure of office to one year.[16] These developments left the sheriff with a much shortened list of duties. Sir Edward Coke compiled a famous (but "narrow"[17]) description of what the 16th century sheriff still had to do:

---

[1] *See* D. Boland, "The Ancient Office of Sheriff" (1951) 211 L.T. 177 at 179, where there is a list of some of the more curious old responsibilities of the sheriff and where it is said with delightful English understatement: "The present day sheriffs have not the varied duties which devolved upon the sheriffs of olden times."

[2] W.A. Morris, *The Medieval Sheriff to 1300* (1927), at 143. T.F.T. Plucknett, in *A Concise History of the Common Law* (5th ed., 1956) at 101, tells us that the king's reeve became "shire reve" as the king saw the need for a local official answerable to him and "not to the alderman," who had been the "titular head" of shire and county. *See also* W.S. Holdsworth, 1 *A History of English Law* (1956) at 6.

[3] *See Pelham's Case*, (1583) Sav. 43, 123 E.R. 1002; *see also* F. Pollock and F.W. Maitland, 1 *The History of English Law before the Time of Edward I* (2nd ed., 1923), at 533. *And see* G. Jacob, *A New Law-Dictionary* (1736), under the entry "Sheriff, Shiriff or Shire-reve."

[4] H. Cam, *Law-Finders and Law-Makers in Medieval England* (1962) at 32.

[5] Morris, *supra*, note 2 at 20. Edward the Elder was king from 899 to 925, and Edgar the Pacific from 959 to 975: *see* G.S.P. Freeman-Glenville, *The Queen's Lineage* (1977) at 5. As Morris, supra, note 2, says at 1: "With the single exception of the kingship, no secular dignity now known to English-speaking people is older." Other modern historians would seem to put the birth of the sheriff a little later than would Morris—sometime during Canute's reign: *see* I. Gladwin, *The Sheriff: The Man and his Office* (1974) at 26-7 and *Mather on Sheriff and Execution Law* (3rd ed., 1935) at 1. There were king's reeves before the time of Edward the Elder (Morris, at 3), perhaps as early as King Ine (who, according to Freeman-Glenville, at 2, reigned from 688 to 726 or728), but they were "a prototype of the sheriff, not the sheriff himself." (Morris at 18.) Dalton had thought that " . . . Sherifes were first ordained of King Aelfred (or Alfred, otherwise called Alured in our English Chronicles) who reigned about Anno Dom. 872:" *see* M. Dalton, *Officium Vicecomitum or The Office and Authoritie of Sherifs* (1623) at Folio 1. In fact, as Freeman-Grenville notes, at 5, Alfred the Great succeeded to the throne in 871 and died on October 25, 899.

[6] "The word *sheriff* or *shire-reve* is derived from two *Saxon* words *scire*, *province* or *shire*; or rather from *sciran*, to divide, and *gerefa*, grave, *Reve* or perfect, being denominated from the first division of the kingdom into counties:" *see* J. Impey, *The Office of Sheriff* (1786) at 6. *See also* Dalton, *ibid.* at Folio 2 and Co. Inst. Part I at 168a. In *Malott v. The Queen*, (1886) 1 B.C.R. (Pt.2) 212 (S.C. *en banc*), Begbie C.J. said at 215:

> It cannot be denied that an English 'shire' is . . . . the exact equivalent of an English 'county,' nor that the sheriff is exactly a 'vice comes'. In fact, 'shire' is a portion 'shorn' out of the whole kingdom and placed under the administration (*ad haec*) of a 'reeve', the sheriff. The 'comitatus' is the definite portion of the kingdom which is placed under the authority of the 'comes' or his 'vice comes,' *i.e.*, the sheriff—the same officer, for the same purposes; it is the same thing expresed in different languages, Latin and early English, and 'county' or 'shire' equally mean a geographical district divided off from the rest of the realm by definite boundaries and placed under the authority of a sheriff, who has to perform therein all executive functions in the administration of justice; it is his 'bailiwick' — the *vicus* or district which has been bailed or handed over to him.

[7] *See* Morris, *supra*, note 2 at 18-19 and Gladwin, *supra*, note 5 at 27. Canute seized the throne of England in 1016 and he died in 1035: *see* Freeman-Glenville, *supra*, note 5 at 7. Some readers may be interested to know that while the sheriff was called *vicecomes* by clerks during Norman times, the "title of the sheriff in popular speech already [had] much of its modern sound" by late in the 12th century: *see* Morris, *supra*, note 2 at 113 and at 37.

[8] Gladwin, *supra*, note 5 at 29.

> And he hath a threefold custodie, *triplicem custodiam*, viz. First, *vitae justiciae;* for no suit begins, and no processe is served but by the sherife. Also he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vitae legis;* he is, after long suits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vitae reipublicae;* he is *principalis conservator pacis*, within the countrie, which is the life of the common wealth, *vita reipublicae pax*.

The process of decline continued with the loss in time by the sheriff of his military[19] and then police[20] responsibilities. In the result, in England the office of sheriff is now largely ceremonial,[21] although the important responsibilities of executing writs and of caring for Her Majesty's Judges remain.[22]

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[9] W.S. McKechnie, *Magna Carta* (2nd ed., 1914) at 311.

[10] *Ibid.* at 15.

[11] It is ironic. The sheriff " was kept in his place as a servant of the king, and that is what made possible his own decline ": *see* S.F.C. Milsom, *Historical Foundations of the Common Law* (1969) at 4.

[12] *Supra*, note 9 at 312. *See also* F.W. Maitland, *Justice and Police* (1885) at 69: "Now the whole history of English Justice and Police [by which he meant, at 1, "those institutions and processes whereby that country's law is enforced"] might be brought under this rubric, *The Decline and Fall of the Sheriff*." *See also* Holdsworth, *supra*, note 2 at 66.

[13] By cap. 24 of *Magna Carta*, the sheriff was prohibited from holding pleas of the Crown: *see* "The Text of Magna Carta 1215," trans. G.R.C. Davis, set out as an Appendix to I. Jennings, *Magna Carta* (1965). At the same time, " the rise of a centralized judicial system began to sap his power": *see* Holdsworth, *supra*, note 2 at 7. *See also* Mather, *supra*, note 5 at 5, and at 20-1. The sheriffs in England no longer have any real judicial duties at all (*see* s. 18 of the *Sheriffs Act, 1887*, 50 & 51 Vict. c. 55), although in Scotland they still preside over the Sheriff Courts: *see Sheriff Courts (Scotland) Act, 1971*, c. 58; *see also* McKechnie, *supra*, note 9 at 313. Elsewhere in the Commonwealth, and in South Africa, the sheriff has no judicial work.

[14] *See* W. Stubbs, 1 *The Constitutional History of England* (4th ed., 1883) at 544; and *see* McKechnie, *supra*, note 9 at 15 and Mather, *supra*, note 5 at 21-2. In British Columbia, the sheriff now acts as the coroner's servant: *see* Chapter V. In New Brunswick, every sheriff is *ex officio* a coroner for the Province: *see Sheriffs Act*, R.S.N.B. 1973, c. S-8, s. 9. That approach is particularly interesting because at common law a coroner who became sheriff was "discharged from his office of coroner": *see* G. Atkinson, *Sheriff Law* (3rd ed., 1854) at 7.

[15] *See* Pollock and Maitland, *supra*, note 3 at 534; Mather, *supra*, note 5 at 23-4, and McKechnie, *supra*, note 9 at 15.

[16] He was not to "tarry in his Bailiwick" any longer than that: *see* 14 Edw. III, St. 1, c. 7 (1340). "The real loss of his ancient importance resulted from the limitation of his period of office": Stubbs, *supra*, note 14 *Vol. 2* at 218. "The sheriffs in early days had such large powers that great jealousy was entertained of their remaining long in office, a jealousy arising partly from the great men who feared a dangerous rival to their power in the county and partly from the smaller men who found him an oppressor. The result was that a sheriff was not allowed to serve more than one year, and 'having served could not again be made sheriff until the lapse of three years 'if there be other sufficient person in the county' ": *see* Boland, *supra*, note 1 at 178; and *see* 1 Ric. II, c. 11 (1377).

[17] *See* J.M. Bennett, "The Office of Sheriff: Historical Notes on its Evolution in New South Wales," (1973-76) 7 Sydney L. Rev. 360 at 361.

[18] Co. Inst. Part I 168b. For a more complete statement of the duties of sheriffs in England before 1887, *see* W.H. Watson, *A Practical Treatise on the Office of Sheriff* (2nd ed., 1848) at 2-3.

[19] The duties were assumed by the lord-lieutenants, who were first appointed in Mary's time and who came to prominence in the time of Elizabeth: *see* Holdsworth, *supra*, note 2 at 67 and W.S. Holdsworth, 4 *A History of English Law* (3rd ed. 1945) at 76-7; and *see* McKechnie, *supra*, note 9 at 312. For a description of the sheriff's military authority until Tudor times, *see* Mather, *supra*, note 5 at 10-1.

[20] *See* Holdsworth, *supra*, note 2 at 66 and Maitland, *supra*, note 12 at 70. As late as the seventeenth century, the sheriff was "still the pre-eminent police official of the country;" *see* Mather, *supra*, note 5 at 15. *See also* Gladwin, *supra*, note 5 at 375: "Their police duties . . . are now negligible, for the establishment of a county police force in 1839 removed their responsibility to arrest malefactors . . . ." Nonetheless, in 1957 it was said that the sheriffs in England, along with the mayors of boroughs and county magistrates, still had the duty of "maintaining internal order" in "time of emergency": *see* O. Hood Phillips, *The Constitutional Law of Great Britain and the Commonwealth* (2nd ed., 1957) at 543.

Until 1887, there was no single enactment in England which one could consult about what the sheriffs were and what they could and must do. Parliament that year passed "an Act to consolidate the law relating to the office of sheriff in England, and to repeal certain enactments relating to sheriffs which have ceased to be in force or have become unnecessary."[23] It was not a reform law, because a select committee of the House of Lords met the next year to consider "the Mode of Appointment, the Duties, and the Obligations of the HIGH SHERIFFS of COUNTIES."[24] But even the 1887 statute, most of which remains in force in England today, does little to define the sheriffs' responsibilities. There is no list of duties; only a number of turgid provisions concerning formalities.[25] Of the new law, Lopes, L. J. once said: "It has never been my lot to have to construe an Act more difficult to interpret than this."[26]

Yet, and in a way quite naturally, it was the 1887 *Act* to which the Legislative Assembly of British Columbia turned in 1896 when changes to the sheriff statute in this Province were thought to be necessary. There had been passed an *Order in Council* for Vancouver's Island in 1856[27] establishing a Supreme Court of Civil Justice for that Colony, which among other things, directed the Governor to appoint a sheriff each year. There was also in force the *Sheriffs Act, 1860* in the mainland Colony of British Columbia.[28] Following the union of the Colonies in 1866, there was enacted a series of sheriff's statutes and amendments, beginning with a *Sheriffs' Ordinance* in 1867[29] and culminating in the *Sheriffs Act*,[30] which appeared as one of the Revised

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[21] Since 1585 at least: *see* 27 Eliz., c. 12, and *see* Impey, *supra*, note 6 at 61, and the evidence of Sir Offley Wakeham, Minutes of Evidence, *Report from the Select Committee of the House of Lords on High Sheriffs*, Cmd. 257 (1888), at 65. In 1903 Holdsworth, *supra*, note 2 at 66, said: " . . . though to his office there still clings much of the prestige that belonged to it in days in which he ruled the county as the chief representative of the king, it now gives him very little substantial authority." And *see* McKechnie, *supra*, note 9 at 313: "From presiding, as he did in his golden age, over all the business of the district—financial, administrative, military, and judicial—the sheriff has become in England at the present day, a mere honorary figurehead of the county executive." Finally, *see* R.M. Jackson, *The Machinery of Justice in England* (7th ed., 1977) at 191, where today's sheriffs are described as being "no more than picturesque embellishments of the legal scene."

[22] There are several other more minor duties. The only modern list can be found in C.H. Beaumont, *The Law Relating to Sheriffs and their Officers* (1968) at 103-08. That list is now out of date became the *Courts Act, 1971*, 1971, c. 23 relieved the sheriff of a number of responsibilities. Appendix I to the *Guide to the Office of High Sheriff* (1979), prepared by the Council of the [English] Shrievalty Association, is enlightening: "There remains from the once great powers and official duties of the Sheriff principally:—The Execution of High Court Writs in his name; the care of Her Majesty's Judges; the duties of Electoral Returning Officer in certain constituencies; and, above all, the upholding of the Rule of Law and Order and the uniting of all her subjects in loyalty to the Sovereign." The work of the sheriff is actually supervised by under-sheriffs, about whom more will be said in Chapter III.

[23] *Sheriffs Act, 1887*, 50 & 51 Vict., c. 55. The whole or part of 72 statutes, the first of which was enacted in 1275, were repealed. They are listed in the Third Schedule to the Act.

[24] *See Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 21 at III. And *see Lee* v. *Dangar, Grant & Co.*, [1892] 2 Q.B. 337, 352 (C.A.), where Lopes L.J. said, of the *Sheriffs Act* at 352: "It is not an Act to consolidate and amend the law, but merely an Act to consolidate it."

[25] In *Lee* v. *Dangar, Grant & Co.*, *ibid.* at 344, Lord Esher, M.R. said of s. 29: " . . . a more unclear exposition and codification of the law . . . it is hardly possible to imagine."

[26] *Ibid.* at 352.

[27] *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council* (4 April 1856).

[28] It was a Proclamation of His Excellency, James Douglas, Governor of the Colony of British Columbia. *See* British Columbia, *List of Proclamations for 1858, 1859, 1860, 1861, 1862, 1863 and 1864*, No. 4. The draftsman was apparently Sir Matthew Baillie Begbie: *see* D.R. Williams, *The Man for a New Country* (1977) at 155.

[29] *Sheriffs Ordinance, 1867*, R.L.B.C. 1871, No. 68 [5 March 1867]. It seems that the Ordinance was actually passed on 16 February 1867: *see* "A Bill," *The Daily British Colonist* (Victoria), 23 February 1867, at 2. *The Courts Declaratory Ordinance, 1868*, R.L.B.C. 1871, No. 99 [1 May 1868], should also be mentioned. It made the legislation relating to the sheriff all one in the new united Colony of British Columbia. Section 2 provided:

> All the jurisdiction, powers, and authorities which before the passing of the 'British Columbia Act, 1866' were by Law vested in and had and exerciseable by the Sheriff of Vancouver Island for the time being, in all matters, process, and proceedings, civil as well as criminal, and before all Courts in the said Island, under and by virtue of the Order in Council of the 4th day of April A.D.1856, shall be deemed and taken to have been and to continue during the pleasure of the Governor vested in the High Sheriff for the time being of British Columbia, as and from the 19th day of November, A.D. 1866.

Statutes of British Columbia in 1897.[31] That *Act*, which was the work of the Honourable Theodore Davie,[32] was intended to be:[33]

> . . . a condensation of the English law relating to sheriffs, and of the British Columbia Statutes upon the same subject. The Act sweeps away the old statute law of England . . . and assimilates the law to that now existing in England, as modified and changed by Provincial Legislation.

There were only a few substantive changes to the *Sheriffs Act* during the next 79 years.[34] The most important change was made by section 3 of the *Sheriffs Act Amendment Act, 1918*.[35] That provision abolished the office of "fees" sheriff in those parts of the Province in which the section was proclaimed, and gave to the Lieutenant-Governor in Council the power to appoint civil servants to do the work.[36] While these employees were still called "sheriffs" and while the jobs they did were the jobs which sheriffs had traditionally done, the nature of the *office* was changed. For the first time in British Columbia, none of these sheriffs depended for his livelihood on fees for the services he performed. All of them were paid a salary by the government. No longer did they choose their own staffs. Their premises were staffed and administered by the government of the day.[37] These new sheriffs for the first time accepted direction where before they had given it. And so it must be said that the decline of the sheriff — now the colonial sheriff — continued.

A revision of the *Sheriffs Act* in 1960[38] followed a series of housekeeping amendments. Then, in 1974, there was a dramatic reversal of the sheriffs' fortunes in this Province. First, each sheriff in British Columbia was given

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[30] R.S.B.C. 1897, c. 172. It is worthwhile to set out the legislative history: *Sheriffs Act*, S.B.C. 1873, No. 7; *Sheriffs Act, 1873*, C.S.B.C. 1877, c. 146; *Sheriffs' Act (1873) Amendment Act, 1878*, S.B.C. 1878, c. 17; *Fees Act, 1879*, S.B.C. 1879, c. 16; *Sheriffs and Registrars Act, 1880*, S.B.C. 1880, c. 24; *An Act to amend the "Sheriffs' Act, 1873" and amending Acts*, S.B.C. 1888, c. 33; *Sheriffs Act*, C.S.B.C. 1888, c. 106; *An Act to amend the Sheriffs Act*, S.B.C. 1890, c. 45; *Sheriffs' Act Amendment Act, 1892*, S.B.C. 1892, c. 41; *Sheriffs' Act Amendment Act, 1896*, S.B.C. 1896, c. 43. It did not seem to matter whether there should be an apostrophe or where it should be placed in the important word.

[31] In *Malott v. The Queen*, *supra*, note 6 at 215-16, Begbie C.J. described some of the changes made during this period:

> Up to 1873 the whole of the mainland of British Columbia, so far as the shrievalty was concerned, continued to be one bailiwick, with one sheriff, whose executive powers extended over the whole Province, as, up to Confederation in 1871, they extended over the Colony. But in 1873 there were carved out of the mainland two shrievalties—one sheriff, the Sheriff of New Westminster, to have jurisdiction over the electoral districts therein mentioned, including the electoral district of Kootenay, and extending also over Kamloops; and another, the Sheriff of Cariboo, to have jurisdiction over the electoral districts of Clinton and Cariboo . . . By the 'Sheriffs' Amendment Act, 1878', the district of Kootenay was quite dissociated from Kamloops and was taken out from the jurisdiction of the Sheriff of New Westminster and placed under a sheriff of its own; and there is accordingly at this day a Sheriff of Kootenay . . .

Regrettably, there is not much history of this kind to be found. The "Confederation" which Chief Justice Begbie mentions was the admission of the Province of British Columbia into the Dominion of Canada: *see* P.W. Hogg, *Constitutional Law of Canada* (1977) at 448.

[32] T. Davie, *Draft Revised Statutes of British Columbia. First Report* (1896).

[33] *Ibid.* at s. 30. The Hon. Mr. Davie included as an Appendix to his draft a list of the English statutes which were to be swept away. His list is the same as the list contained in The Third Schedule to the *Sheriffs Act, 1887*, 50 & 51 Vict. c. 55, except that the last 7 statutes of the 72 in the English list were not copied. Davie's list was not printed in or as an appendix or schedule to the *Sheriffs Act*, R.S.B.C. 1897, c. 172. It might be assumed that the Legislature intended to repeal everything in Mr. Davie's list because his *Report* was addressed to the Lieutenant-Governor (at 3), who had the law-making power "by and with the advice and consent of" the Legislative Assembly: *see* the *Constitution Act*, C.S.B.C., 1888, c.22, s. 19. What went to the Lieutenant-Governor, presumably and at least notionally, went to the Assembly.

[34] All the changes can be found in the following *Acts*: *Sheriffs Act*, R.S.B.C. 1911, c. 210; *Sheriffs Act Amendment Act, 1914*, S.B.C. 1914, c. 69; *Sheriffs Act Amendment Act, 1918*, S.B.C. 1918, c. 79; *Sheriffs Act Amendment Act, 1921*, S.B.C. 1921, c. 42; *Sheriffs Act*, R.S.B.C. 1924, c. 231; *Sheriffs Act Amendment Act, 1930*, S.B.C. 1930, c. 65; *Sheriffs Act*, R.S.B.C. 1936, c. 260; *Sheriffs Act*, R.S.B.C. 1948, c. 304; *Sheriffs Act*, S.B.C. 1953, (2nd Sess.), c. 29; *Sheriffs Act*, R.S.B.C. 1960, c. 355; *Sheriffs Act Amendment Act, 1962*, c. 56; *Sheriffs Act Amendment Act, 1965*, S.B.C. 1905, c. 48; *Statute Law Amendment Act, 1974*, S.B.C. 1974, c. 87.

[35] S.B.C. 1918, c. 79.

[36] *Ibid.*, s. 12. According to The Hon. Mr. Gardom, an Attorney-General during the mid-1970's, it was decided at the time that the Counties of Vancouver, Victoria and Westminster should have civil servant sheriffs: (1976) 4 *Debates of the Legislative Assembly for British Columbia* 3133. *See also* Province of British Columbia, Ministry of the Attorney-General, *Sheriff Services Program Inventory and Review* (1977) at 2. The "fees" sheriffs had always been appointed by the Lieutenant-Governor in Council: *see, e.g.*, *Sheriffs Act*, R.S.B.C. 1911, c. 210, s. 3. Appointment of civil servants was perhaps not such a startling move as it might seem, because in 1888 a committee of the House of Lords had recommended that the Under Sheriff should be a "permanent officer of the county:" *see Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 21 at IV. Nothing came of that recommendation.

[37] *Sheriffs Act Amendment Act, 1918*, S.B.C. 1918, c. 79, s. 12 and s. 4.

[38] R.S.B.C. 1960, c. 355.

jurisdiction throughout the Province, so that county boundaries became irrelevant as far as the office of sheriff was concerned.[39] This was a rather remarkable development after a thousand years of shires. Moreover, new duties were assigned to a growing body of deputy sheriffs and sheriff's officers[40] — though this assignment was accomplished by administrative decision, not by legislation. These new deputies and officers undertook much custodial work which, in the past in British Columbia, had been the preserve of police officers.[41]

It is important to note that the decision to expand the sheriff's responsibilities was taken in order to free police agencies for other law enforcement duties.[42] It is questionable whether full consideration was given to what consequences might result for the sheriff from the transfer of responsibilities. The decision to shift duties was a pragmatic one, taken at a time in the history of the Province when there was something like a crisis over policing.[43] Ironically, in some cases, duties were assumed by the sheriff which had historically been the responsibility of sheriffs in England, but which had never passed to sheriffs in British Columbia.[44]

In 1976, the *Sheriffs Act* was substantially redrafted for the first time since 1897.[45] The new Act was part of a wider legislative programme[46] designed to consolidate the administration of justice and, although the Act itself does not disclose it, intended to reflect the assumption of the new responsibilities which had taken place in 1974. Among other things, the "fees" sheriff was laid to rest for good.[47]

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[39] *Statute Law Amendment Act, 1974*, S.B.C. 1974, c. 87, s. 35. This provision changed the common law: *see Platt v. Lock and Ayliff, Sheriffs of London* (1550) 1 Plowd 35, 75 E.R. 57, 60, which has always stood for the proposition that a sheriff has no authority outside the county for which he is appointed.

[40] In the 27 June 1978 issue of the *Victoria Times*, under the headline "Meet the Sheriff," at 9, Mr. Sheriff Lee is quoted: "In 1973, the service had a staff of 54. A year later the number jumped to 115 and by 1976 it had mushroomed to 575. The Social Credit government cut the staff quota to 449 in 1977 and 443 this year." In the Spring of 1983, there were about 450: *see* D. Hunter, "Now Barrett's Brownies' 450," *The Province*, 21 March 1983, at A4.

[41] *See Report of the Task Force on Sheriff Services* (1977), at 1: "In 1974, the entire role of Sheriff Services was expanded dramatically. Sheriffs assumed from police agencies a range of duties associated with criminal cases. This change was to meet two fundamental objectives:

1. To assign the duty of carrying out the orders of the Court to a neutral body removed from association with the prosecution;
2. In so doing, to release police officers for law enforcement duties."

See also Province of British Columbia, Ministry of the Attorney-General, *Sheriff Services Operating Manual* (1978), at chapter 2, page 17, where a second sentence is added to the first objective: "Sheriff Services are qualified to represent the Crown and her Courts, but are removed from association with the prosecution—an association police officers cannot avoid." *And see* the comments of the Attorney-General, The Hon. Mr. Macdonald, in (1975) 2 *Debates of the Legislative Assembly for British Columbia* at 955 and 1367 and of the Hon. Mr. Gardom, *supra*, note 36 at 3133. It is worth mentioning as well that in August 1977 two Court Services Circulars were distributed by the director of sheriff services in the Ministry of Attorney General to all employees in his division. The first circular, CSS 7/77, 19 August 1977, prohibited the use of flashing lights, sirens and similar emergency equipment on sheriff's vehicles. The second circular, CSS 8/77, 24 August 1977 read:

> The functions of a Sheriff's office are of a distinct non-police nature. The image of a neutral agent in the judicial system is important to enable the sheriffs and deputy sheriffs to fulfil their duties. Because of this, and because sheriffs and deputy sheriffs must not be confused as police officers, it is preferred that sheriffs and deputy sheriffs do not become auxiliary members of any police force.

Both circulars remain in effect: *see* pages 2-88 and 2-21 *Sheriff Services Operating Manual*. The neutrality of deputy sheriffs in practice is not absolute. In Vancouver, they assist the office of Crown Counsel by helping to arrange for the attendance of Crown witnesses in criminal cases, and in some places they help by serving Notices of Greater Penalty (sanctioned by the *Criminal Code*, R.S.C. 1970, c. C-34, s. 594) on accused persons in drinking-driving cases. Moreover, deputy sheriffs are trained in the use of the kinds of warnings which would normally be associated only with policemen, *e.g.*, "warnings" for the purpose of extracting explanations about possession of stolen property, housebreaking instruments and explosives, and a warning about forthcoming narcotics charges. The only warning they really need to learn is the warning to persons whom they arrest for obstructing a peace officer that they are not obliged to say anything. (They should also be told that they may speak to a lawyer.)

[42] *See, e.g.*, P.S. Millar and C. Baar, *Judicial Administration in Canada* (1981) at 370-1. The title of this book is misleading. In fact, the book is a study of the administration of courts by the executive branch. The term "judicial administration" should be reserved to describe administration of courts by the judiciary, in whom the responsibility for administration must inevitably lie if judges are to retain their independence.

[43] For contemporary reports of the decision, *see* "Sheriff Slated for a Comeback" *Victoria Times*, 26 August 1974 at 5 and "Three Deputy Sheriffs Learning Court Duties" [Victoria] *Daily Colonist*, 17 September 1974 at 19.

[44] The *Order in Council* of 4 April 1856, *supra*, note 27, does not seem to have given the sheriff much to do. It is not clear why that is so since the sheriff has not been treated as a subject worthy of study by historians in British Columbia. For example, "Sheriff" is not listed as an entry in the index in F. W. Howay, *British Columbia* (1914) or in M. Ormsby, *British Columbia: A History* (1958). Nor is there discussion of the office in any volume of The British Columbia Historical Quarterly or in B.C. Studies, two obvious sources.

[45] *Sheriffs Act* S.B.C. 1976, c. 50. There were 60 provisions in the revised Act of 1960. This number was reduced to 12 in the 1976 statute. The new Act was amended once: *see Attorney-General Statutes Amendment Act, 1977*, S.B.C. 1977, c. 31.

[46] For a discussion of the program, *see Sheriff Services Program Inventory and Review*, *supra*, note 36 at 2-4.

It would be misleading to describe the legislative history of the *Sheriffs Act*[48] in British Columbia without discussing other enactments which in one way or another touch the office. These will be considered in the following chapters. For now, the point to be made is that the Act is the only statute concerned with the sheriff *qua* sheriff. For that reason, it is remarkable that it does not contain a list of the duties which the sheriff must discharge or of the powers he may exercise. Throughout this paper, attention is paid to the question of whether a legislative statement of the authority and duties of the sheriff is desirable.[49]

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[47] Section 2 (1) of the *Sheriffs Act*, S.B.C. 1976, c. 50 provided for the appointment of a director of sheriff services, sheriffs, deputy-sheriffs and other employees "pursuant to the Public Service Act." The last "fees" sheriffs had in fact been replaced with public servants in April 1973: *see Sheriff Services Program Inventory and Review, supra*, note 36 at 2.

[48] Now the *Sheriff Act*, R.S.B.C. 1979, c. 386. There are 12 provisions.

[49] The question has been asked in New South Wales: *see* Bennett, *supra*, note 17 at 374:

> That one should be expected to delve, often in obscure corners, into the Charter of Justice, the Sheriff Act, the Constitution Act, the Jury Act, the Public Service Act, other statutes, the common law, and rules of court, in order to piece together some notion of who the sheriff is and what he does, is a state of things scarcely creditable to the law.

CHAPTER III

MISCELLANY

A. The Constitutional Authority to Appoint Sheriffs

In this federation, no matter what the topic, a question is always asked: "Who has the constitutional authority to do it?" So it is natural to address the question: "Who has the legislative authority to appoint sheriffs?" Of course, the answer depends on the purpose or purposes for which they are appointed. For the most part, the sheriff in British Columbia historically was, and now is, appointed to help with the administration of justice in British Columbia, which is a subject matter falling within the legislative competence of the Legislative Assembly for the Province.[1] Thus, Chief Justice Begbie said in 1886:[2]

> I cannot doubt the perfect capacity, under the B.N.A. Act, s. 92, sub-sec. 14, of the Provincial Legislature, in its care for the administration of justice, to divide the Province into districts, the exact equivalent of English counties so far as the jurisdiction of the Sheriff is concerned, and to provide for the appointment of Sheriffs in such districts.

This conclusion is consistent with the opinion expressed two years later in Ontario by Street J. in *Regina* v. *Bush*[3] that the provincial legislatures have the exclusive right:

> . . . to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all the . . . officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters.

More recently, Chief Justice Laskin said:[4]

> 'Administration of Justice in the Province' within s. 92 (14) is not a head of power which has hitherto been closely examined in the case law. It has been regarded, and properly so, as supporting provincial appointment of judicial officers and Judges other than those covered by s. 96: see, for example, *R.* v. *Bush* (1888) 15 O.R. 398. It certainly envisages the provision of facilities through which Courts and like tribunals can carry out their functions, and also, I would say, the appointment of support staff and enforcement officials necessary to assist in the judicial process.

Much of this paper is an examination of the place of the sheriff in the administration of justice in British Columbia. For now, it is enough to say that the sheriff and his deputies are in some ways "support staff" for the courts and that they comprise all of the courts' "enforcement officials."[5] But the sheriff is capable of doing more than merely help to administer justice. For that reason and another — the section 96 issue[6] — it is too much to say flatly that the Province would be justified in claiming the power under section 92 (14) to appoint the sheriff for all purposes. For some purposes, other provincial heads of jurisdiction might have to be called in aid. The question of constitutional authority will be touched on from time to time in this paper, particularly in the context of the duties fixed on the sheriff by the provincial *Expropriation Act.*[7]

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[1] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92 (14): "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subject next hereinafter enumerated; that is to say, ... 14. The Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

[2] *Malott* v. *The Queen*, (1886) 1 B.C.R. (Pt. 2) 212 at 216 (S.C. *en banc*). It was a criminal case. The accused had been committed for trial in Kootenay district, where the crime had been committed, but was tried at Kamloops before a jury summoned from the Kamloops district. The Court held that this procedure was incorrect and that the accused should have been tried in Kootenay by a Kootenay jury summoned by the Kootenay sheriff. McCreight J. delivered separate reasons in the case and did not discuss the constitutional point. It can be assumed that he agreed with Begbie C.J. because he did not refute what the Chief Justice said and he reached the same conclusion. Crease, Gray and Walkem JJ. are reported to have concurred, but it is not clear who it was they supported.

[3] (1888) 15 O.R. 398 at 404 (Q.B.). In *Reference re Adoption Act* [1938] S.C.R. 398, one of the leading cases on the question of the legislative authority over "the Administration of Justice in the Province," Duff C.J.C., for the Court, at 406, called Mr. Justice Street's judgment "admirable." The passage quoted was considered and not disapproved of in the dissenting judgment delivered by Dickson J. in *R.* v. *Hauser*, [1979] 1 S.C.R. 984 at 1034.

[4] *See Di Iorio and Fontaine* v. *Warden of the Common Jail of Montreal and Brunet et al.*, (1977) 73 D.L.R. (3d) 491 at 498 (S.C.C.). It should make no difference that Laskin, C.J.C. was dissenting in the case.

[5] "If there were a Sheriff's Code, it would almost certainly be predicated upon the dictum: THE COURT'S ORDER SHALL BE OBEYED": *see* Province of British Columbia, Ministry of the Attorney-General, *Sheriff Services Operating Manual* at chapter 2, page 16.

[6] Section 96 of the *Constitution Act, 1867*, 30 & 32 Vict., c. 3, which gives the federal government the power to appoint superior court judges.

B. The Sheriff's Place

In England, it was said in the last century that the sheriff had "a curious collection of disconnected duties."[8] Those words are more apt today in British Columbia where each deputy sheriff could be called on any day to be accountant, appraiser, attendant, auctioneer, bailiff, clerk, contractor, court orderly, custodian, detective, escort, executive officer, guide, guard, host, judge, marshal, notifier, policeman, process server, summoner, taxing officer and travel agent. He or she might also be expected to act as a returning officer and tax-collector, and might also find himself or herself to be a litigant.[9] Every deputy must (of course) always know some magic and be capable of acrobatics.[10]

Consider the variety of the responsibilities which the office of the sheriff now shoulders in British Columbia.[11] Broadly speaking, the people appointed to work in what the government calls "sheriff services:"

1. serve process in connection with civil and criminal court proceedings;
2. levy execution in civil proceedings;
3. empanel juries in the County Courts and in the Supreme Court of British Columbia and guard and provide for the comfort of jurors;
4. attend the judges of all the courts in the Province and provide court security to ensure the safety of judges, witnesses and the public;
5. escort accused prisoners to and from court, escort "patients" under the *Mental Health Act*[12] to and from provincial mental health institutions, and escort witnesses where their safety is threatened;
6. arrange the attendance for trial of Crown witnesses in criminal cases, including their transportation and accommodation; and (in some areas), assist the office of Crown Counsel by serving notices of greater penalty[13] in drinking-driving cases;
7. serve motor vehicle driver's licence suspension notices and seize motor vehicle driver's licences and licence plates under the *Motor Vehicle Act;*[14]
8. assist the coroner on inquests by, among other things, summoning the jurors;
9. arrest alleged contemnors on the order of judges of all the courts in the Province;

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[7] R.S.B.C. 1979, c. 117.

[8] F.W. Maitland, *Justice and Police* (1885) at 70.

[9] Although not as frequently now as in the past: *see* G. Turriff, "A Colloquy about Sheriffs and Nulla Bona Returns" (1980) 38 The Advocate 23–34 at 23.

[10] ". . . [T]he sheriff is often placed in positions of difficulty, out of which he must get as well as he can." *per* Williams J. in *Munk* v. *Cass* (1841) 9 Dowl. 332, at 333. *And see Humphreys* v. *Pratt*, (1831) 5 Bligh N.S. 154, 5 E.R. 269 (H.L.), at E.R. 273, where the sheriff is described as being "placed between two fires."

[11] Simple lists of what the sheriff does in British Columbia can be found in *Report of the Task Force on Sheriff Services* (1977) at 2-4, and in Province of British Columbia, Ministry of the Attorney-General, *Sheriff Services Operating Manual* at chapter 2, pages 17–19. For a more complete discussion of the responsibilities, see Province of British Columbia, Ministry of the Attorney-General, *Sheriff Services Program Inventory and Review* (1977) at 6-20.

[12] R.S.B.C. 1979, c. 256.

[13] These notices are mentioned in the *Criminal Code*, R.S.C. 1970, c. C-34, s. 594.

[14] R.S.B.C. 1979, c. 288. Seizures are purportedly made under the authority of s. 83 (9).

10. guard the government agent on his way to the bank with the Crown receipts;[15]
11. (as marshals of the Federal Court of Canada,) arrest ships and sell ships and cargo on Court order.

In addition to these duties, the sheriff may be called upon under provincial or federal statutes to make seizures,[16] to take or deliver possession of land[17] (and to put down resistance to the taking when necessary[18]), to prevent breaches of the peace or disturbances,[19] to "read the Riot Act,"[20] and to give aid and assistance generally when called upon to do so by certain commissions[21] and by the Legislature of the Province.[22] All of these responsibilities are discussed in this paper.

One remarkable but sometimes unnoticed fact about the sheriff in British Columbia is that he is a servant of two masters: in theory, he must satisfy both Crown and court,[23] whose interests may sometimes conflict.[24] But the modern list of duties shows that over time the sheriff has become much less a "royal officer" and much more an "officer of all of the courts."[25] The division in accountability is an important one which presents vexing problems because demands for efficiency in government and in the courts are now testing the relationship between the executive and the judiciary.[26] The question of accountability and the problems of administration are discussed in Chapter IX.

C. Appointment of the Sheriff, Deputy Sheriffs, Sheriff's Officers and Others

In England, great ceremony attends the annual nomination and appointment of the sheriffs:[27]

> On the twelfth day of November in every year (or if that day fall on a Sunday then on the ensuing Monday) persons fit to serve as sheriffs shall be nominated for every county at the Royal Courts of Justice in the manner that has been heretofore used and observed, and shall be so nominated by the following great officers,

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[15] There seems to be no statutory authority for this responsibility, although it was a recognized duty for the sheriff at common law: *see, e.g.*, W. Morris, *The Medieval Sheriff to 1300* (1927) at 272, who mentions (in the thirteenth century) ". . . the carriage of the king's money, for which sheriffs were as a rule required to provide safe conduct."

[16] *See, e.g., Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 69 (2); and *Land Act*, R.S.B.C. 1979, c. 214, s. 57; *Repairers Lien Act*, R.S.B.C. 1979, c. 363, s. 9; *Woodworker Lien Act*, R.S.B.C. 1979, c. 436, s. 12. *And see Customs Act*, R.S.C. 1970, c. C-40, s. 133 and *Canada Shipping Act*, R.S.C. 1970, c. S-9, s. 498 (where the power is given but without, it seems, the duty).

[17] *See British Columbia Railways Act*, R.S.B.C. 1979, c. 38, s. 32 (6); *Commercial Tenancy Act*, R.S.B.C. 1979, c.54, s. 29 (2); *Expropriation Act*, R.S.B.C. 1979, c. 117, s. 87 (2); *Health Act*, R.S.B.C. 1979, c. 161, s. 19; *Railway Act*, R.S.B.C. 1979, c. 354, s. 72; *Vancouver Charter*, S.B.C. 1953, c. 55, s. 539; *Expropriation Act*, R.S.C. 1970, c. 16 (1st supp.), s. 35; and *Railway Act*, R.S.C. 1970, c. R-2, s. 180; *and see Public Works Act*, R.S.C. 1970, c. P-38, s. 22 (1) (c) where it is contemplated that the power to give possession of a federal public work may be vested in the sheriff.

[18] *See British Columbia Railway Act; ibid.* s. 72, *Health Act*, s. 19; *Vancouver Charter*, s. 539; and *Railway Act*, R.S.C. 1970, c. R-2, s. 180.

[19] *See County Court Act*, R.S.B.C. 1979, c. 72, s. 20.

[20] *See Criminal Code*, R.S.C. 1970, c. C-34, s. 68.

[21] *See Election Act*, R.S.B.C. 1979, c. 103, s. 280; *Utilities Commission Act*, S.B.C. 1980, c. 60, s. 109; *Inquiry Act*, R.S.B.C. 1979, c. 198, s. 16.

[22] *Legislative Assembly Privilege Act*, R.S.B.C. 1979, c. 229, s. 4.

[23] The courts (it should not have to be said) are the Queen's courts. *But see Supreme Court Act*, R.S.B.C. 1979, c. 397, s. 2, where the words "Her Majesty's Supreme Court of British Columbia," which appeared in R.S.B.C. 1960, c. 374, s. 4, have been omitted. However, there is still a reference to "Her Majesty's Royal Arms" in section 7. The judges are undoubtedly the Queen's Judges at common law: *see John Russell & Co. Ltd.* v. *Cayzer, Irvine & Co. Ltd.*, [1916] 2 A.C. 298 (H.L.) at 302.

[24] *See, e.g., In re Norton et al.*, [1918] 2 W.W.R. 865 (Alta A.D.).

[25] *See* s. 5 of the *Sheriff Act*, R.S.B.C. 1979, c. 386.

[26] *See, generally*, J. Deschenes, *The Sword and the Scales* (1979) Chapter 7 ("The Independent Management of Judicial Business") and J. Deschenes, *Independent Judicial Administration of the Courts*, a study sponsored by the Canadian Judicial Council in co-operation with the Canadian Judges Conference and the Canadian Institute for the Administration of Justice (1981). *And see* G. Watson, "The Judge and Court Administration" in A. Linden ed., *The Canadian Judiciary* (1976) at 162, and C. Baar, "The Future of Judicial Independence and Judicial Administration," a paper delivered at the Annual Meeting of the Canadian Judges Conference, at Montreal, on 27 August 1980. *See also* the *Report of the Honourable Mr. Justice Seaton, Commissioner* (23 October 1979), on a Commission of Inquiry pursuant to Order in Council #1885 (British Columbia).

> namely, the Lord High Chancellor of Great Britain, the Lord High Treasurer, or if there is no Lord High Treasurer, the Chancellor of the Exchequer, the Lord President and others of Her Majesty's Most Honourable Privy Council, and the Lord Chief Justice of England, or any two or more of such great officers, taking to them the judges of Her Majesty's High Court of Justice, or any two or more of them.[28]

The manner "heretofore used and observed" was described by Atkinson in 1854:[29]

> On the morrow of *St. Martin*, the Lord Chancellor &c., assemble in the Court of Exchequer. The great officers of State arrange themselves, on the Bench, on the right and left of the Ld. Ch. Baron. An officer administers an oath to them, in French, that they will nominate no one from favour, partiality or improper motive. The same officer[30] then, having the list of all the counties in alphabetical order, and a list of the names of those who were nominated the year before, except *Middlesex*, *Lancashire*, and *Cornwall*,[31] reads over the three names, and the last of the three he pronounces to be the *present Sheriff*. If there be any objection to serve, the letter of excuse[32] is then read, and if the excuse be allowed, another name is substituted. If there be no objection, one rises and says, 'To the two gentlemen I know no objection, and I propose A.B. Esq., in the room of the present Sheriff.' Another officer has a paper, which the Clerk of the Assize for each county has transmitted to him; also another, with the names on the former list; and, whilst the three are nominated, he prefixes 1, 2, 3, to their names, according to the order in which they are placed. The Bill or Nomination list, being thus made up, is reported (by the Clerk of the Privy Council who is in attendance) to H.M. in Council.
>
> . . . The Bill or Nomination list, being thus approved of, and reported to H.M. in Council, she takes a pin, and to insure impartiality, as it is said, lets the point of it fall upon one of the three names; and the person, upon whose name it *chances to fall*, is Sheriff for the ensuing year. This is called *pricking for Sheriffs* . . . ."[33]

In British Columbia, where "a director of sheriff services, sheriffs, deputy sheriffs and other employees" may be appointed "pursuant to the *Public Service Act*,"[34] the Public Service Commission makes the appointments in the ordinary course of its work.[35] There is no ceremony at all.

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[27] *Sheriffs Act, 1887*, 50 & 51 Vict., c. 55, s. 6(1). Before the 14th century, the sheriffs were always appointed by the King: *see* Morris, *supra*, note 15 at 176, 177. In 1300, Edward I ". . . conceded to the men of each shire wherein the shrievalty was not of fee the right to elect the sheriff if they so desired" (Morris, at 184; and *see* 28 Edw. I., c. 8 (1300)). "But the privilege was sparingly exercised if it was exercised at all, and was withdrawn by the Ordinances of 1311:" *see* W. Stubbs, 2 *The Constitutional History of England* (4th ed., 1906) at 217-8; and *see* Morris at 184-5. The current method of nomination and appointment has its origin in 14 Edw. III, St. 1, c. 7 (1340).

[28] But Sir William R. Anson, in *The Law and Custom of the Constitution* Vol. II, Part I (3rd ed., 1907) at 182, n. 1, said: "The Sheriffs Act, 50 & 51 Vict. c. 55, does not require that more than *one* great officer of State should be present, and two judges" (emphasis added). He also said, "Practically it is necessary that six or seven judges should attend."

[29] G. Atkinson, *Sheriff-Law* (3rd ed., 1854) at 8-10.

[30] This officer is the Queen's Remembrancer: *see* J. Derriman, *Pageantry of the Law* (1955) at 107 and *see* 34 Hals. (3rd ed.), para. 1143, n. (d) and Anson, *supra*, note 28 at 181.

[31] Some places, among them these three, had the historical right to appoint their own sheriffs: *see Rex & Regina* v. *Larwood* (1694) 1 Ld. Raym. 29, 91 E.R. 916, at E.R. 918, and C.H. Beaumont, *The Law Relating to Sheriffs and their Officers* (1968) at 7-9. These three places still have this right.

[32] In England, the office of sheriff is compulsory. A justification for the compulsion is found in W.H. Watson, *A Practical Treatise on the Office of Sheriff* (2nd ed., 1848) at 5: "As the queen has an interest in every subject, and a right to his service, it is a general rule that no man can be exempt from the office of sheriff but by act of parliament or letters patent." It is arguable in British Columbia whether anyone could be compelled to serve as sheriff. That question is discussed in Chapter IV.

[33] A modern account of the nomination procedure can be found in Derriman, *supra*, note 30 at 106-09, and *see* 34 Hals. (3rd), para. 1143, n. (d). *See also Mather on Sheriff and Execution Law* (3rd ed., 1935) at 31-2; and *see* the Minutes of Evidence in the *Report from the Select Committee of the House of Lords on High Sheriffs* Cmd. 257 (1888) at 3-4. Each Sheriff is obligated by s. 23 of the *Sheriffs Act, 1887*, 50 & 51 Vict., c. 55 to appoint an under-sheriff and will also appoint bailiffs and officers to do much of the actual work of the office: *see* Beaumont, *supra*, note 31 at 11.

[34] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 2 (1). All "employees" of sheriff services can be removed for just cause: *see Public Service Act*, R.S.B.C. 1979, c. 343, s. 48 (2). They are all paid under ss. 16 and 54 (f) of the same *Act*.

[35] The appointments are made pursuant to the *Public Service Act*, R.S.B.C. 1979, c. 343, s. 4 (a). The Commission has a duty under s. 4 "to develop and maintain a competent and efficient public service" and under s. 20 must make appointments to the public service on the basis of merit and on the basis of examinations, reports, tests, records, ratings and recommendations "pursuant" to the Act. "Merit" is defined in s. 20 (2). The commissioners hold office during good behaviour but "may be removed at any time by an Act or resolution of the Legislative Assembly:" *see* s. 3 (4) of the *Act*. Formerly, "fees" sheriffs were appointed by the Lieutenant-Governor in Council: *see, e.g., Sheriffs Act*, R.S.B.C. 1911, c. 210, s. 3. That was the case for the public servant sheriffs as well: *see Sheriffs Act*, R.S.B.C. 1960, c. 355, s. 3.

There is now only one sheriff in British Columbia. He is sheriff by virtue of his appointment as director of sheriff services, in accordance with the *Sheriff Act*.[36] Until April, 1973, there was a sheriff for each county in the Province. Then for six years there was a "regional sheriff" in each of the nine counties. All of these sheriffs reported to the director. In 1979, these regional sheriffs were replaced as part of an administrative reorganization of the court services division of the Ministry of Attorney General. Under a new scheme, which was intended to centralize court administration,[37] five "justice regions" were designated, fourteen districts were created and nine regional court administrators, nine regional court reporters and nine regional sheriffs became five regional managers. Today, each of these five regional managers supervises court administration, court reporters and recorders, and sheriff services within his or her region.[38] Under each regional manager are at least two district managers. And under them there are local managers for each of the three heads of responsibility. Each local manager of sheriff services is a deputy sheriff.

The present district and regional managers may at some time have been deputy sheriffs, but they need not have been; it is just as likely that they rose in the public service from the court administration or court reporter branches. There is no doubt that they do not have the store of knowledge and experience about the work of the sheriff which the regional sheriffs and their predecessors had.

The regional managers all report to the director of court services. He is the director of sheriff services as well[39] and, as mentioned, is the only sheriff in British Columbia.[40] Although it need not be so, all other employees of sheriff services are managers, deputies, officers or clerks. The Attorney General[41] may designate a person to act "as director" and "sheriff" in the director's absence,[42] or the director may make the designation himself.[43]

By section 3 (1) of the *Sheriff Act*, the director of sheriff services is responsible to the Attorney General for the administration of the Act, "for the direction of sheriff services generally and for the establishment and maintenance of programs for the selection and training of sheriffs and other persons appointed" under the Act. In practice, the director reports to the Deputy Attorney General.[44] It is not clear whether it was intended by the Legislature that he do so, or that he need do so: section 3 (1) of the Act seems to conflict with section 11 (1) of the *Public Service Act*[45] which imposes on every deputy minister, including the Deputy Attorney General, "the duty and authority, subject to the minister, to supervise and direct the employees" in his ministry. There seems to be no reason for skirting the Deputy Attorney General on questions relating to the administration of sheriff services. Indeed, the central place of the sheriff in the administration of justice in the Province, for which the Deputy Attorney General is responsible generally under section 11 (2) of the *Public Service Act*,[46] would seem to demand that the Deputy be kept regularly informed. It is therefore recommended, if the recommendations contained in Chapter IX are not taken up, that section 3 (1) of the *Sheriff Act*[47] be amended to provide that the director of sheriff services is responsible to the Deputy Attorney General for those things listed in the section, rather than to the Attorney General himself.[48]

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[36] R.S.B.C. 1979, c. 386, s. 3 (3).

[37] The director of court services, who is also the director of sheriff services, has stressed that a close relationship between sheriff services, court clerks and court reporters is "absolutely essential." "The information flow between these three disciplines must continue to grow and develop." *See* (1980) 1 Forum (Issue 4) at 2. Forum is a publication of the court services division of the Ministry of Attorney General.

[38] The State of New South Wales has also adopted "regional management": *see Minutes of a Conference of [Australian] Sheriffs*, Melbourne, Victoria, 27 February 1979 at 95.

[39] There is no legislation which would require the director of court services and the director of sheriff services to be the same person.

[40] Some deputy sheriffs feel "at sea" without a local *sheriff* to whom they can report. It is partly a question of status: when asked by members of the public, they cannot say *whose* deputy they are.

[41] The Attorney General is the "minister" charged with administration of the *Sheriff Act*: *see* B.C. Reg. 387/76, 12 July 1976. In 1980, the deputy director of court services was designated to act "as director" of sheriff services when the incumbent was appointed to the Bench of the County Court of Vancouver.

[42] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 3 (2) and (3).

[43] *Ibid*.

[44] A former director, until his appointment to the Bench in 1980, was "Associate Deputy Attorney General." The present director is an "Assistant Deputy Attorney General."

[45] R.S.B.C. 1979, c. 343.

Deputy sheriffs, in fact, do most of the work in sheriff services. On occasion, they are helped by sheriff's officers, who are public servants but who have not been trained as deputies. Clerks are appointed by the Public Service Commission under section 2 (1) of the Act to assist with administration. "Fee-for-service" process servers are also hired from time to time. They are appointed by the director (and could be appointed by sheriffs authorized by him, if there were any) under section 2 (2) of the Act. Their appointments are appointments to act "as" deputy sheriffs.[49] In 1980, provision was made[50] for payment of fees by municipalities to sheriff services where sheriff services serves documents issued at the instance of the municipalities. Two deputy sheriffs have been specially appointed in Vancouver exclusively to serve the City's process.[51]

D. The Authority of Deputy Sheriffs and of Sheriff's Officers

There was never any doubt at common law in England that a sheriff could make a deputy. In 1736, the power was acknowledged by Jacob to be "incident" to the office[52] and Impey said in 1786 that deputies were appointed "from the necessity of the thing and in furtherance of justice."[53] For that reason, it seems that there have been deputy sheriffs almost as long as there have been sheriffs themselves.

In the time of Edward the Confessor (1042–1066)[54] (as it has been said),[55] " . . . [t]he same custom which gave *oefgrefan* or *bydelas* to *deman*[,] and *gingran* to the more important administrative officials doubtless attached deputies also to sheriffs." They helped the Domesday sheriff[56] and were part of an "organized office force" by 1170.[57] During the reign of Henry III (1216–1272), different classes of subordinates are mentioned, but the chief subordinate was the "under-sheriff,"[58] who was the real "deputy."[59] In 1833, his appointment was made compulsory, rather than elective, when each sheriff was directed to "nominate and appoint some fit and proper Person" to supervise the work of the office.[60] The under-sheriff had always supervised the other officers in the sheriff's employ. These were or at least have included the bailiffs, one of whose jobs it was and is in England to do the distasteful work of execution.[61]

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[46] *Ibid.* The section provides in part: "The deputy minister has the general supervision of the business of the ministry . . ."

[47] R.S.B.C. 1979, c. 386.

[48] The Attorney General is ultimately responsible in any event: *supra*, note 41; and *see* s. 2 (c) of the *Attorney General Act*, R.S.B.C. 1979, c. 23.

[49] In practice, these appointments are made by letter. The director of sheriff services has prepared a form letter for the purpose. The people appointed are not trained as deputies. "Fee-for-service" process servers have no job security. They are not members of the union which represents the deputy sheriffs and enjoy none of the protections given to public servants by the *Public Service Act*, R.S.B.C, 1979, c. 343. On the other hand, their hours of work are flexible. At least one complaint arising from dismissal of a "fee-for-service" process server has been made to the Provincial Ombudsman, but no action was taken on the complaint in light of the nature of the appointment. In some places in the Province, clerks hired as public servants to help with administration in sheriff services are also appointed under section 2 (2) to serve process.

[50] *See* the *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 8.1.

[51] They were appointed as deputy sheriffs by the director of sheriff services. They were not first trained as deputy sheriffs the way other appointees are.

[52] G. Jacob, *A New Law-Dictionary* (1736), under the entry "Deputy;" *see also Kitton* v. *Fag*, (1710) 10 Mod. 288, 88 E.R. 732 *and* the remark of Ritchie J. during argument in *Pattison* v. *Tingley*, (1861–63) 10 N.B.R. 553 at 555 (S.C. *en banc*).

[53] J. Impey, *The Office of Sheriff* (1786) at 58.

[54] *See* G.S.P. Freeman-Grenville, *The Queen's Lineage* (1977) at 6.

[55] *See* Morris, *supra*, note 15 at 24. *See also* T. Davenport, "High Sheriffs—History and Duties of the Ancient Office of Sheriff," which appears as Appendix G to the *Report From the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 33 at 124; and *see* Watson, *supra*, note 32 at 32.

[56] Morris, *supra*, note 15 at 53.

[57] *Ibid.* at 115.

Neither the under-sheriff nor any sheriff's officer attached to the High Court in England has any authority of his own at common law. The powers and duties of the under-sheriff flow completely from the sheriff because a " . . . deputy has no estate or interest in the office, but is but the officer's shadow, and doth all things in the name of the officer himself and nothing in his own name."[62] Bailiffs derive their authority from the warrant issued to them by the sheriff through the under-sheriff. They have no authority from the fact of their appointment alone.[63]

The same exigencies which Impey mentioned for England made deputies useful officers in British Columbia. In the *Order in Council* of 1856 for Vancouver's Island, the sheriff was directed to act "by himself or his sufficient deputies."[64] All the sheriffs, for so long as they were independent contractors, had the power to appoint deputies but the power passed to the Lieutenant-Governor in Council when the public servant sheriff emerged.[65] "Bailiffs" are first mentioned by statute in British Columbia in 1873,[66] but their appointment was not formalized until 1880 in the *Sheriffs and Registrars Act*,[67] when each sheriff was empowered, "in addition to an Under-Sheriff or Deputy Sheriff," to:[68]

> . . . appoint one or more Bailiffs to represent him in his Bailiwick, and exercise all the powers of his office without special authority delegated to them from time to time to that effect.

The reference to delegation was obviously intended to answer the old questions of the extent to which a deputy could act in the name of the sheriff[69] and of how far he could by statute act in his own name on the sheriff's behalf.[70]

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[58] *Ibid.* at 189. Watson, *supra*, note 32 at 32 claims that the chief deputy was first called "under-sheriff" in 13 Edw. I St. 2 (1285). Morris, *supra*, note 15 at 163, n. 190, mentions John de Wichenholt, who served as "under-sheriff" of Berkshire in 1202-3.

[59] *See Norton* v. *Simmes*, (1615) Hob. 13, 80 E.R. 163 at 164. *See also* Watson, *supra*, note 32 at 37 and *Regina* v. *Lang*, (1851) 1 Legge S.C. 687 at 693. And *see* Mather, *supra*, note 33 at 6-7.

[60] *See An Act for Facilitating the Appointments of Sheriffs etc.*, 3 & 4 Will. IV, c. 99, s. V. *See also Sheriffs Act 1887*, 50 & 51 Vict., c. 55, s. 23 (1). By s. 24, the sheriff must also appoint a "sufficient deputy" in London "for the receipt of writs." This "deputy" has no statutory powers or duties.

[61] *See Report of the [Payne] Committee on Enforcement of Judgment Debts*, Cmnd. 3909, 1969, para. 659; C. Churchill, *The Law of the Office and Duties of the Sheriff* (2nd ed., 1882) at 40; Watson, *supra*, note 32 at 39, Atkinson, *supra*, note 29 at 23-4; 1 Bl. Com. 345; and 34 Hals. (3rd ed.) at para. 1174. *See also* D.F. Martin, *Study of the Profession of Huissiers de Justice*, a report prepared for the Council of Europe, Fellowship for European Legal Studies and Research (September 1980), Part A, sections 1 and 2. The report makes the distinction, which need not be made here, between arrangements in the County Courts and in the High Court of England. Mr. Martin is also author of "A Comparative Study of Enforcement in England and France" (1982) 1 C.J.Q. 219 which contains at 219-23 useful information about bailiffs in England.

[62] *The Earl of Shrewsbury's Case*, (1613) 9 Co. Rep. 46b at 48b, 77 E.R. 798, at 802. *See also Parker* v. *Kett* (1701-1712) 1 Salk. 95, 91 E.R. 88 at 88-9.

[63] *See* Watson, *supra*, note 32 at 42 and Beaumont, *supra*, note 31 at 18. *See also* Martin, *Study of the Profession of Huissiers de Justice*, *supra*, note 61 at para. 2.7.

[64] *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council* (4 April 1856). "Deputy Sheriff" is also mentioned in the *Sheriff's Act, 1860*, Governor Douglas' Proclamation for the Colony of British Columbia.

[65] *See e.g.*, *Sheriffs Act Amendment Act, 1918*, S.B.C. 1918, c. 79, ss. 3, 4.

[66] *Sheriffs Act*, S.B.C. 1873, No. 7, s. 22. No appointments seem to have been made until 1888 at the earliest: *see Report of Select Committee Appointed to Enquire into the Procedure Governing the Office of Sheriff*, printed as an Appendix to (1888) 17 Journals of the Legislative Assembly of the Province of British Columbia.

[67] S.B.C. 1880, c. 24.

[68] *Ibid.* s. 6.

[69] *See, e.g.*, *Crane* v. *Adams*, (1858-60) 9 N.B.R. 59 (S.C. *en banc*); *Pattison* v. *Tingley*, *supra*, note 52; *Morice* v. *Chapman* (1889) 28 N.B.R. 224 (S.C. *en banc*); *Latta* v. *Owens* (1894) 10 Man. R. 153 (Man. Q.B.); *Tweed* v. *Thall*, [1943] 2 W.W.R. 246 (Sask. K.B.).

[70] *See, e.g.*, *Regina* v. *Lang*, *supra*, note 59.

These old questions are no longer of concern in this Province in the light of the disappearance of the sheriff as independent contractor. But the old questions have been supplanted by new ones, to which some attention should be paid.

1. Deputies

In British Columbia, there is one sheriff, but provision exists for the appointment of others if other appointments are thought to be expedient. Provision is also made for the appointment of "deputy sheriffs" and of "other employees." Neither "deputy" nor "deputy sheriff" is defined by statute. For that reason, it may be that where "deputy sheriff" has been used by the legislature, it includes the regional and district managers described earlier, even though they are not called "deputies" or appointed as deputies. That may be so because in every practical sense they are "deputies" of the director of sheriff services.

At common law, it was well known that " . . . a man cannot be a deputy to do any single act or thing, nor can a deputy have less power than his principal . . . "[71] It must follow that by common law, the deputy sheriffs appointed in this Province have all the powers and obligations which "the sheriff" has.[72] The same conclusion seems to follow from two provisions of the *Interpretation Act*.[73] By section 1 of that statute, a sheriff, as "a person in the public service of the Province," is a "public officer." Section 23 (2) provides:[74]

> Words in an enactment directing or empowering a public officer to do something, or otherwise applying to him by his name of office, include a person acting for him or appointed to act in the office and the deputy of the public officer.

This provision applies even when the office of sheriff is vacant.[75] Thus, when the director of sheriff services resigned in 1980 to accept an appointment to the Bench,[76] the deputies were nonetheless still authorized to act, even though much of the legislation in the Province,[77] and some of the federal legislation as well,[78] speaks of "the sheriff," without reference to a subordinate.[79]

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[71] *See Parker* v. *Kett*, *supra*, note 62 at 88; *see also Boucher* v. *Wiseman*, (1595-96) Cro. Eliz. 440, 78 E.R. 680 and *Norton* v. *Simmes*, *supra*, note 59. The deputy is limited to the extent only that he cannot in turn appoint a deputy. *But see* 1 *The Compact Edition of the Oxford English Dictionary* (1979) at 693, col. 224, where it said that in law a deputy is a ". . . person authorized to exercise on behalf of another the whole of his office . . . or some special function of it." *See also Black's Law Dictionary* (5th ed., 1979) at 398. There are no useful broad definitions of "deputy" in any of the other standard lawyer's dictionaries.

[72] "The word 'deputy' is a word well known in the law, and when an Act of Parliament makes use of such a term generally it should receive the same sense that the Common Law takes it in:" *per* Palmer C.J. (dissenting) in *Larkin* v. *McNutt* (1880) 2 P.E.I.R. 300 (S.C. *en banc*) at 306.

[73] R.S.B.C. 1979, c. 206, ss. 1, 23 (2). There is a provision similar to s. 23 (2) in the federal *Interpretation Act*, R.S.C. 1970, c. I-23, s. 2 (1).

[74] *Ibid*. "Deputy" in the provision includes "deputies:" *ibid*. s. 28 (3).

[75] *Ibid*. s. 23 (3).

[76] He was replaced temporarily by the deputy director of court services, who was appointed to act "as director" by the Attorney General under section 3 (2) of the *Sheriff Act*, R.S.B.C. 1979, c. 386.

[77] *See, e.g.*, *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 69 (2); *British Columbia Railway Act*, R.S.B.C. 1979, c. 38, s. 32 (6); *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, ss. 21 (1), 22, 29 (2), 29 (4); *County Court Act*, R.S.B.C. 1979, c. 72, ss. 20, 39, 92; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, ss. 42, 46, (it *also* says "the sheriff or other officer"), 48, 51, 59 (1), 59 (3), 61, 62, 66 (2), 88 (2), 93, 94, 96, 97, 98, 99, 100, 106 (2), 106 (3), 107 and Forms B and C in Schedule 3; *Creditor Assistance Act*, R.S.B.C. 1979, c. 80, ss. 1, 3, 4 (1), 4 (3), 5, 6, 7, 8, 9, 11, 12, 15 (2), 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 45; *Drainage, Ditch and Dyke Act*, R.S.B.C. 1979, c. 98, s. 153; *Election Act*, R.S.B.C. 1979, c. 103, s. 280; *Utilities Commission Act*, S.B.C. 1980, c. 60, s. 108; *Expropriation Act*, R.S.B.C. 1979, c. 117, ss. 39, 40, 41, 42, 43, 47, 49, 67, 87 (s. 38 provides that "sheriff" for the purpose of the duties imposed by the section "includes the person lawfully acting in his place;" that person is the "distinterested" person nominated under the section by the Supreme Court); *Income Tax Act*, R.S.B.C. 1979, c. 190, s. 36; *Inquiry Act*, R.S.B.C. 1979, c. 198, s. 16; *Land Act*, R.S.B.C., 1979, c. 214, s. 57 (1); *Land Title Act*, R.S.B.C. 1979, c. 219, s. 200; *Municipal Act*, R.S.B.C. 1979, c. 290, ss. 757, 758, 759, 760, 761, 762; *Rent Distress Act*, R.S.B.C. 1979, c. 362, s. 8; *Repairers Lien Act*, R.S.B.C. 1979, c. 363, ss. 7, 9; *Sale of Goods Act*, R.S.B.C. 1979, c. 370, s. 20; *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373, s. 9; *Sheriff Act*, R.S.B.C. 1979, c. 386, ss. 2 (2), 3, 4, 5, 6, 7, 8, 8.1; *Small Claim Act*, R.S.B.C. 1979, c. 387, s. 16 (2); *Taxation (Rural Area) Act*, R.S.B.C. 1979, c. 400, s. 35; *Vancouver Charter*, S.B.C. 1953, c. 55, s. 539; *Woodworker Lien Act*, R.S.B.C. 1979, c. 436, ss. 12, 13, 14, 15, 16, 23, 24; *Rules of Court*, Rules 40 (38), 42 (18), 42 (26), 42 (42), 42 (43), 42 (45), 42 (46), 42 (47), 43 (4) (b), 48 (2), 56 (5), 56 (6), 56 (13); Forms 5, 42, 43, 44, 45, 46; Schedule 2 to Appendix C. The forms and the schedule fall within the word "enactment" in s. 23 (2) of the *Interpretation Act*, R.S.B.C. 1979, c. 206: see the definitions of "enactment" and "regulation" in s. 1.

Obviously, section 23 (2) renders unnecessary any general definition of "sheriff" intended to give power to or to impose a duty on a deputy and that explains why no definition is to be found in either of the likely places — the *Sheriff Act*[80] or the *Interpretation Act*.[81] It also means that the definitions of "sheriff" in the *Jury Act*[82] and the *Railway Act*[83] and in the federal *Bankruptcy Act*[84] and *Railway Act*[85] are superfluous. It is recommended, therefore, at least as far as the provincial legislation is concerned, that the definitions be repealed.[86]

2. SHERIFF'S OFFICERS

There is no mention in the *Sheriff Act*[87] of "bailiffs," or of "sheriff's officers," although section 2 (1) speaks enigmatically of "other employees considered necessary to carry out their duties under this or any other enactment." The last reference to sheriff's "bailiffs" in a sheriff statute was made in section 2 of the *Sheriff Act Amendment Act, 1962*.[88] The description "sheriff's officers"[89] was used after 1962. Those officers had all of a bailiff's "powers, rights and privileges."[90] Today, the term "sheriff's officers" itself has been dropped from the *Sheriff Act* and the "deputy sheriffs" now do what the "sheriff's officers" used to do.

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[78] *Dominion Controverted Elections Act*, R.S.C. 1970, c. C-28, s. 26; *Criminal Code*, R.S.C. 1970, c. C-34, ss. 490, 492, 528, 532, 576 (5), 700, 705, 706, 707; Forms 24, 30; *Customs Act*, R.S.C. 1970, c. C-40, s. 133, *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, ss. 21 (1), 30 (4); *Expropriation Act*, R.S.C. 1970 (1st Supp.), c. 16, s. 35, *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, ss. 13, 14; *Public Works Act*, R.S.C. 1970, c. P-38, s. 22 (1) (c); *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, s. 10 (b); *Canada Shipping Act*, R.S.C. 1970, c. S-9, s. 498; *Statistics Act*, S.C. 1970-71-72, c. 15, s. 25; *Supreme Court Act*, R.S.C. 1970, c. S-19, ss. 71, 72, 99, *Canada Temperance Act* R.S.C. 1970, c. T-5, ss. 7, 11, 13.

[79] Some statutes specifically mention "deputy sheriffs," but there does not seem to be any logic in the use of the description: *see, e.g., Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 106 (1); *Utilities Commission Act*, S.B.C. 1980, c. 60, s. 109; *Public Service Labour Relations Act*, R.S.B.C. 1979, c. 346, s. 1 (f); *Railway Act*, R.S.B.C. 1979, c. 354, s. 1; *Sheriff Act*, R.S.B.C. 1979, c. 386, ss. 2 (1); *Small Claim Act*, R.S.B.C. 1979, 387, c. 58; *Workers Compensation Act*, R.S.B.C. 1979, c. 437, s. 46; *Criminal Code*, R.S.C. 1970, c. C-34, ss. 2, 214 and Form 36; *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 13 (2) and *Railway Act*, 1970, c. R-2, s. 2.

[80] R.S.B.C. 1979, c. 386.

[81] R.S.B.C. 1979, c. 206.

[82] R.S.B.C. 1979, c. 210, s. 1: "'sheriff' means any person lawfully holding the office of sheriff or lawfully performing the duties of sheriff by way of delegation, substitution, temporary appointment or otherwise."

[83] R.S.B.C. 1979, c. 354, s. 1: "'sheriff' includes deputy sheriff or other legal competent deputy; and where any matter in relation to land is required to be done by any sheriff, the expression 'the sheriff' in those cases means the sheriff for the district, county or place where the land is situated; and if the land in question, being the property of one and the same person, is situated not wholly within one district, county or place, the same expression means the sheriff of the district, county or place where any part of the land is situated."

[84] R.S.C. 1970, c. B-3, s. 2: "'sheriff' includes bailiff and any other officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor."

[85] R.S.C. 1970, c. R-2, s. 2: "'sheriff' means the sheriff of the district, county, riding, division, city or place within which are situated any lands in relation to which any matter is required to be done by a sheriff, and includes an undersheriff or other lawful deputy of the sheriff."

[86] The second part of the definition of "sheriff" in the *Railway Act*, R.S.B.C. 1979, c. 354, deserves to be repealed in any event because it is obsolete now that there are no sheriffs of counties in British Columbia: *see* s. 4 of the *Sheriff Act*, R.S.B.C. 1979, c. 386.

[87] R.S.B.C. 1979, c. 386. "Fee-for-service" process servers, appointed under s. 2 (2) of the *Act*, are discussed in section E of this chapter.

[88] S.B.C. 1962, c. 56, s. 2, amending s. 6 of the *Sheriffs Act*, R.S.B.C. 1960, c. 355.

[89] "Sheriff's officers" were mentioned for the first time by statute in British Columbia in the *Sheriff's Ordinance, 1867*, C.S.B.C. 1871, No. 68 [5 March 1867], s. 6. The reference suggests that there were "sheriff's officers" in at least one of the Colonies before 1867. "Sheriff's officer" and "bailiff" seem to have been synonomous in England: *see* Impey, *supra*, note 53 at 69, Churchill, *supra*, note 61 at 40, Watson, *supra*, note 32 at 39 and Atkinson, *supra*, note 29 at 226. *See also Parrot* v. *Mumford, Sheriff of Kent*, (1797) 2 Esp. N.P.C. 585, 170 E.R. 463, where a bailiff engaged by a sheriff is described as his "officer." Bailiffs now do the work of enforcement in the County Courts in England, while it is usually done by "declared" sheriff's officers in the High Court. Those officers must "declare" that they will not use their office corruptly. Sometimes "employed" sheriff's officers are also used; they are called "bailiffs": *see* Martin, *Study of the Profession of Huissiers de Justice*, *supra*, note 61 para. 1.2 and para 2.7 and Martin, "A Comparative Study of Enforcement in England and France," *supra*, note 61 at 219-23.

[90] For those powers, rights and privileges, *see* V. Powell-Smith, "Rights and Duties of Bailiffs" (1969) 119 New L.J. 393. Today in British Columbia, "bailiff" is reserved for a special almost powerless class of licensed collection agents who are usually called upon by creditors to enforce contractual rights to the possession of specific goods: *see, e.g., R.* v. *Todd*, (1978) 6 B.C.L.R. 66 (Prov. Ct.) at 72.

There is now a problem of terminology because "sheriff's officers" are still appointed in the Province pursuant to section 2 (1) of the *Sheriff Act*. They are "employees" of sheriff services who are neither appointed *as* deputy sheriffs nor *called* deputies in practice.[91] They neither rank with the deputies nor do what the deputies do. They are appointed for a limited purpose,[92] which is usually to assist the deputies at court in discharging their jury responsibilities at common law and under the *Criminal Code*.[93] The sheriff's officers are almost never called upon in practice to do anything else.

These "sheriff's officers" are probably not "deputies" at common law because they are not expected to exercise all the powers the sheriff has. If they are not "deputies" at common law, then section 23 (2) of the *Interpretation Act*[94] would only give them the power to act or require them to act when a statute refers to the "sheriff" if it could be said that a "sheriff's officer" is "a person acting for 'the sheriff' or appointed to act in the office." That seems unlikely. It is more likely that the legislature meant by the words in section 23 (2) only to include a person who is acting or who is specially appointed to act *temporarily* for the office-holder — for instance, when the office-holder is absent for a long period. "Sheriff's officers" are obviously not appointed to act *for* the sheriff because they are appointed with the expectation that they will only do certain work. For the same reason, it could not be said that they are appointed to act *in the office*. At best, they are appointed to assist another or others who have been appointed for that purpose.

The conclusion seems also to follow from the subordinate position given to the phrase in the provision, "and the deputy of the public officer," and from the fact that no other subordinates are mentioned. There seems to have been no intention to authorize a person who is not at least a deputy to act when the public officer is directed to do so.

If this analysis is correct, then a sheriff's officer need not and cannot act when "the sheriff" is given a responsibility or power by statute.

The status of the "sheriff's officer" is made more complicated because, despite its omission from the *Sheriff Act*, the phrase "sheriff's officer" is found in other provincial and federal legislation. Use of the phrase is indiscriminate. Equally indiscriminate is use of the word "officer" when it is found with sheriff, as in "the sheriff or other officer." For example, by section 29 of the provincial *Interpretation Act*, "peace officer" includes a sheriff and "sheriff's officer." The same is true of "peace officer" under section 2 of the *Criminal Code*.[95] "Sheriff's officer" is mentioned specifically in several provincial statutes,[96] and "officer" is used with "sheriff" in many others.[97] "Deputy sheriff" is given another usage altogether.[98] There is sometimes no consistency in usage even within a single statute.[99]

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[91] *See* Province of British Columbia, *Treasury Board Job Description Form: "Sheriffs' Officer."* Some judges call these sheriff's officers "court officers," because the people who did the same work before 1974 were described that way. Those people were not connected with any sheriff.

[92] There is a full list of duties on the *Treasury Board Job Description Form*, *ibid*. but in practice the "sheriff's officers" do not do all those things. For example, because there are not enough of them in the superior courts, they do not usually (except in serious criminal cases) escort the judges to and from the courtrooms. The Registrar's clerks are now expected to do that. This duty can be onerous for the clerks, who already have a duty to look after the exhibits: *see* Rule 40 (11) of the Rules of Court and *see* Rule 8 of the Criminal Rules, 1977, drawn up under s. 438 of the *Criminal Code*, R.S.C. 1970, c. C-34. In the inferior courts, clerks always escort the judges.

[93] R.S.C. 1970, c. C-34, s. 576 (5).

[94] R.S.B.C. 1979, c. 206.

[95] R.S.C. 1970, c. C-34.

The administrators in the Ministry of Attorney General do not expect and do not want those they call "sheriff's officers" to act whenever the sheriff or a deputy sheriff must act or may act. But it seems clear that the legislators intended "sheriff's officer," and "officer" when it is used with "sheriff," to mean a sheriff's lawful subordinate, by whatever name he or she might be called in fact. "Sheriff's officers" are appointed under section 2 (1) of the *Sheriff Act* and thus they must be appointed "to carry out *their* duties under this or any other enactment." *Their* duties, because they are "sheriff's officers," must be the duties of "sheriff's officers" under provincial and federal legislation in which that description is used. Thus, it seems to be inescapable that "sheriff's officers," who are appointed under section 2 (1) of the *Sheriff Act* to be guards and custodians, must act and may act whenever a "sheriff's officer" is directed or empowered by statute to act.[100] Arguably, they could also be compelled to act — as "officers" — where a statute calls on "the sheriff or other officer."[101] And so in this roundabout way, "sheriff's officers" become a kind of "deputy," even though they would not be considered to be deputies at common law, even though the Legislature has not declared them to be deputies, and even though they are not wanted as deputies by those charged with supervising what they do. Appointment of "sheriff's officers" under section 2 (2) rather than section 2 (1) of the *Sheriff Act* would be a simple solution to this problem of nomenclature.

It is suggested that steps be taken to rationalize the usage of "deputy sheriff" and of "sheriff's officer." If it is thought that there should be two classes of subordinate official, then the *Sheriff Act* and all other provincial statutes should be amended where necessary to make the distinction clear.[102] That is to say, "sheriff's officers" should be called something else, or "deputy" should be defined to exclude "sheriff's officer" and the legislation should prescribe "deputy" when "deputy" is intended and "officer" when "officer" is intended. If only one class is wanted, then "deputy" should be defined to include "sheriff's officer," in which case "sheriff," together with section 23 (2) of the *Interpretation Act*,[103] would be all that is needed.

E. The Sheriff's Liability

It is not clear in British Columbia just who is responsible if something in "sheriff services" should go wrong. In England, the sheriff himself, if no one else, is liable. Thus, in 1854, Atkinson could say:[104]

> As applied to the High Sheriff and his officers, the maxim *respondeat superior* prevails to the fullest extent; it approaches well nigh to an universal truth. For all civil purposes the law regards them as *one*.

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[96] *See e.g., Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 71 (5) ("A sheriff and any of his officers"); *Company Act*, R.S.B.C. 1979, c. 59, s. 79 (1) (b); *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 70; *Jury Act*, R.S.B.C. 1979, c. 210, s. 3 (1) (k); *Justice Administration Act*, R.S.B.C. 1979, c.211, s. 1 ("sheriffs, and their officers"); *Municipal Act*, R.S.B.C. 1979, c. 290, s. 82; *see also* the federal *Criminal Code*, R.S.C. 1970, c. C-34, s. 214.

[97] *Book Accounts Assignment Act*, R.S.B.C. 1979, c. 32, s. 13 (1) (b) ("sheriffs and other persons . . . carrying out a process of execution"); *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 1; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, ss. 46, 52, 53, 54, 56, 66 (1) and (2), 67, 71; *Creditor Assistance Act*, R.S.B.C. 1979, c. 80, s. 4 (2); *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, s. 10 ("sheriff or *bailiff*[!] or other similar officer"); *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 118; *Health Act*, R.S.B.C. 1979, c. 161, s. 19 ("the sheriff or other person"); *Law Stamp Act*, R.S.B.C. 1979, c. 226, s. 4; *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373, s. 25 (b) ("a sheriff and other persons . . . carrying out any process of execution"); *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 9 (1) ("sheriff or other person acting under the authority of the director or a sheriff:). *See also* the federal *Dominion Controverted Elections Act*, R.S.C. 1970, c. C-28, ss. 86, 100 and *Criminal Code*, R.S.C. 1970, c. C-34, ss. 560, 571, 598.

[98] *Supra*, note 79.

1. RESPONDEAT SUPERIOR

Respondeat superior has its origin in the second Statute of Westminster (1285).[105] As far as the sheriff was concerned, the rule was "hinted at, if not fully developed"[106] in 1797 in the case of *Parrot* v. *Mumford, Sheriff of Kent*,[107] although the first recorded application of the maxim to a "vice-comes" is probably *Laicock's Case*[108] in the time of Charles I. A number of judges have said why the sheriff himself should be responsible.[109] Maule J. put it this way last century in *Smith* v. *Pritchard*:[110]

> The reason that the sheriff is held liable is, that, having a duty imposed upon him by law, instead of performing it himself, he delegates it to another; and therefore it is but just that he should be responsible for the misconduct of those to whom he so delegates the performance of his duty.

In England, the sheriff's responsibility for the actions of his officers is an onerous one: for example, he may find himself liable even where the officer has ignored clear directions from the sheriff about what to do.[111] Nevertheless, there are limits: the sheriff will be excused where the officer has acted at the insistence or with the consent of the party who seeks to make him responsible.[112]

For the most part,[113] it is not necessary in this Province to worry about the principle of *respondeat superior* and its application to the sheriff.[114] This is so because it has been held that the rule ought not to apply where the sheriff is a public servant. There is a string of cases to this effect.[115] Viewed from one angle, they decide that it is unfair for the sheriff to have to shoulder the blame for the work of people over whom he has no ultimate control. In England, *respondeat superior* was applied because there:[116]

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[99] *Compare, e.g.*, ss. 46, 70 and 106 (1) of the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75.

[100] *See* the statutes listed in note 96, *supra*.

[101] *See* the statutes listed in note 97, *supra*.

[102] The Parliament of Canada should follow suit.

[103] R.S.B.C. 1979, c. 206.

[104] Atkinson, *supra*, note 29 at 226.

[105] 13 Edw. I, St. 2, c. 11. *And see Hall* v. *Smith*, (1824) 2 Bing. 156, 130 E.R. 265, at 267; and *Larkin* v. *McNutt*, *supra*, note 72 *per* Palmer C.J. (dissenting) at 303, and Peters J. at 311. *See also* T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956) at 475.

[106] *Gregory* v. *Cotterell*, (1855) 5 El. & Bl. 571, 119 E.R. 593 at 598-9, *per* Jervis C.J. for the Court of Exchequer Chamber.

[107] (1797) 2 Esp. N.P.C. 585, 170 E.R. 463. In fact, the rule seemed well settled in 1771: *see Sa(u)nderson* v. *Baker*, (1771) 3 Wils. K.B. 310, 95 E.R. 1072. *See also Woodgate* v. *Knatchbull*, (1787) 2 T.R. 148, 100 E.R. 80 (K.B.).

[108] (1627) Latch. 187, 82 E.R. 338: "Et sur chescun default en le execution del office, comenq soit *p* neglect, ou fraud del south vic, le vic serra amerce, & fine icy, & en l'Exchequer."

[109] *See, e.g.*, *Woodgate* v. *Knatchbull*, *supra* note 107 at 86, *per* Grose J. and *Gregory* v. *Cotterell*, *supra*, note 106 at 598-9, *per* Jervis C.J.

[110] (1849) 8 C.B. 565, 137 E.R. 629 at 638.

[111] *See Scarfe* v. *Hallifax*, (1840) 7 M. & W. 288, 151 E.R. 775. A letter from the sheriff to the officer instructing him not to demand too much on an execution was held to be inadmissible on the sheriff's behalf.

[112] Crowder v. *Long*, (1828) 8 B. & C. 598, 108 E.R. 1164. For a helpful digest of the sheriff's responsibility, *see* 34 Hals. (3rd) at 696-9.

[113] It is still necessary to address the issue of "fee for service process servers." There is some discussion of the subject later in this section.

[114] At least part of the principle represented by the maxim was imported into the law relating to the sheriff in the Colony of Vancouver's Island. The *Order in Council* of 4 April 1856, *supra*, note 64, provided that the sheriff was to be responsible "during his continuance in such office" for the deputies whom he appointed.

[115] *Larkin* v. *McNutt*, *supra*, note 72; *Great Northern Insurance Co.* v. *Young*, [1917] 1 W.W.R. 886 (Alta. S.C.); *Reum* v. *Rutherford*, (1917) 37 D.L.R. 715 (Sask. S.C.); *DeZouche* v. *Cook et al.*, [1920] 2 W.W.R. 268 (Sask. K.B.); *Rex* v. *Stephen*, [1924] 1 D.L.R. 565 (Sask. K.B.); *Higgins* v. *Macdonald*, [1928] 2 D.L.R. 89 (B.C.S.C.) [the case went on appeal (see [1928] 4 D.L.R. 241) but the sheriff was not a party]; *Gunn's Pure Foods Ltd.* v. *Roe and Canadian Surety Company*, [1934] 2 W.W.R. 108 (Alta. S.C., App. Div.). Against all these is the lone case of *Ross* v. *Fiset*, [1926] 3 D.L.R. 289 (Sask. K.B.) which held the sheriff responsible for a bailiff's defalcation. That decision was explained in *Higgins* v. *Macdonald* at 91 as one in which the sheriff still had a power of appointment, even though the office was a part of the civil service. It follows on that analysis that *Ross* supported rather than ran contrary to the *Higgins* conclusion. *Ross* was either not argued or was ignored in *Gunn's Pure Foods*. It might also be said that the *Ross* case turned on its own peculiar facts: there, no evidence was adduced to prove how the bailiff was appointed, and the Court was not prepared to assume that the appointment was made by the government. Instead, it assumed at 294-95, that the sheriff had the power of appointment.

[116] *Per* Walsh J. in *Great Northern Insurance Co. et al* v. *Young supra*, note 115 at 889.

> . . . [T]he connection between the State and the sheriff after his appointment or election is of a very casual character. He is practically placed in the sole and undisturbed discharge of the duties of the shrievalty. He takes to his own use the emoluments of the office and out of them meets the expenditures of it. He employs under sheriffs or deputy sheriffs and bailiffs of his own selection. He assigns to them the work that they are to do, pays them their salaries and dismisses them at his pleasure. His office is in its management entirely free from outside dictatorship or control. He runs it as an institution for which he and he alone is responsible to those whose business passes through it. And so in these jurisdictions he is held liable for the misconduct of those whom he employs in his office.

In Canada, as one judge said in 1917:[117]

> . . . the work of the sheriff's office is no longer deemed to be that of a sheriff who must either perform it himself or get it done for him and on his account, but it is considered as part of the public service of the province, for the performance of which the government of the day appoints the necessary officials and staff. This being so, I do not see how the doctrine of *respondeat superior* can be made to apply.

It is important to understand clearly the theory on which application of the principle of *respondeat superior* has been rejected in those cases in which it has been established that the office of sheriff was a department of the public service. Earlier it was suggested that a measure of control is important. Whether the sheriff or the government has "control" seems from the authorities to turn on who has the power of appointing, paying and dismissing the officers whose conduct has put the liability of the sheriff into question. As Lord Brougham said in *Duncan* v. *Findlater:*[118]

> The rule of liability and its reason, I take to be this: I am liable for what is done for me and under my orders by the man I employ,[119] for I may turn him off that employ when I please . . .

These considerations are what moved the courts in *Great Northern Insurance Co.* v. *Young,*[120] *Reum* v. *Rutherford,*[121] *Higgins* v. *Macdonald*[122] and *Gunn's Pure Foods Ltd.* v. *Rae and Canadian Surety Co.*[123] to conclude that the sheriff should not be held responsible:[124]

> . . . [H]ow unjust it would be to impose liability upon a sheriff in this Province for the acts of a man for whose appointment he is in no sense responsible and over whom he has no power of dismissal or even suspension.

The point was even more starkly made in 1979 at a Conference of Australian sheriffs. There, the Tasmanian representative said:[125]

> Why should the fact that you have this sort of job make you personally liable, when in almost [all] other areas of public service, if you make a moderate blunder the Crown is responsible?

In British Columbia, as it has been said, the appointment of everybody in sheriff services, except the "fee-for-service" process servers,[126] rests with the government[127] or at least with its creature, the Public Service Commission.[128] All these employees are paid by the government under sections 16 and 54 (f) of the *Public Service Act*[129] and may be suspended,[130] removed or dismissed by the government under the same statute.[131]

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[117] *Per* Lamont J. in *Reum* v. *Rutherford, supra*, note 115 at 718.

[118] (1839) 6 Cl. & Fin. 894; 7 E.R. 934 at 940.

[119] "Employ" suggests "pay."

[120] *Supra*, note 115 at 890-1.

[121] *Supra*, note 115 at 717.

[122] *Supra*, note 115 at 91.

[123] *Supra*, note 115 at 110-1.

[124] *Per* Walsh J. in *Great Northern Insurance Co. et al.* v. *Young supra*, note 115 at 891. In *Larkin* v. *McNutt*, *supra*, note 72, the majority had been even bolder. They excused the sheriff, though he made the appointments (Hensley J. at 314, called them "nominations"), on the ground that he was obligated by statute to appoint the officers and therefore had no control over them. They were not "personal deputies or bailiffs" in the same way that the sheriff's officers in England were. This conclusion is questionable.

[125] *See* the *Minutes of the Australian Conference*, *supra*, note 38 at 35.

[126] They are appointed by the director under s. 2 (2) of the *Sheriff Act*, R.S.B.C. 1979, c. 386.

[127] *See Sheriff Act*, R.S.B.C. 1979, c. 386, s. 2 (1).

It follows, therefore, that under the present arrangement neither the Attorney General, nor his Deputy, nor the director of sheriff services, nor his assistant, nor any regional, district or local manager, nor any supervising deputy sheriff is liable for the acts or omissions of any of his subordinates.

2. Who to Sue?

It is possible that the Crown itself could be sued as ultimate employer for the wrongful acts of a "sheriff services" employee even though none of his or her "superiors" would be liable. Actions against the provincial Crown are permitted by the *Crown Proceeding Act,*[132] but section 3 (2) prescribes important limitations:

> Nothing in section 2
>
> (a) authorizes proceedings against the Crown for anything done or omitted to be done by a person acting reasonably and in good faith while discharging or purporting to discharge responsibilities
>
> (ii) that he has in connection with the execution of judicial process;
>
> (e) authorizes proceedings against the Crown for anything done in the due enforcement of the criminal law . . .

Subparagraph (a) effectively protects the Crown against most actions that might arise from execution work, but not, perhaps, from wrongs done while process is being served.[133] It is harder to gauge the scope of subparagraph (e). For example, are deputy sheriffs who escort prisoners employed "in for the due enforcement of the criminal law" or are they just helping with the administration of justice? In other words, was the clause intended only to protect the Crown from complaints made against police officers?

Actions in tort against the federal Crown for wrongs done by provincially appointed sheriffs and deputies who are *ex officio* sheriffs and deputy sheriffs or marshals or deputy marshals of the Federal Court[134] may be brought under section 3 of the federal *Crown Liability Act.*[135] If the amount claimed by the plaintiff is more than $1,000.00, then the proceeding must be brought in the Federal Court.[136] If not, the claim may be determined by a "provincial court."[137]

Attention must be paid to the question of the liability of the actual wrongdoers — the deputy sheriffs and sheriff's officers themselves. Doubtless they are personally liable for any wrong they do.[138] In practice, as long as they have acted "in the course of" their duties, no matter how wrong they may have been, the government is prepared to indemnify them against the cost of retaining counsel and against any damages which may be awarded in favour of a claimant.[139] In this way, there is some hope that successful claimants will be paid. But there is nothing in any statute requiring the government to indemnify and therefore claimants would be left unprotected if the government decided to change its policy. They would also be unprotected as against judgment-proof employees of sheriff services who have acted unlawfully and outside the scope of their employment. It seems to be too much to ask innocent claimants to shoulder the loss.[140]

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[128] The Commission is the government's creature as much as it is a creature of the Legislature because s. 3 (6) of the *Public Service Act*, R.S.B.C. 1979, c. 343 provides that the members of the Commission ". . . shall be paid the remuneration and be employed under terms and conditions determined by the Lieutenant Governor in Council." In reality, the Lieutenant Governor in Council is the provincial Cabinet: *see* the definition of Lieutenant Governor in Council in s. 29 of the *Interpretation Act*, R.S.B.C. 1979, c. 206 and *see* s. 10 of the *Constitution Act*, R.S.B.C. 1979, c. 62, which prescribes the composition of the "Executive Council."

[129] R.S.B.C. 1979, c. 343.

[130] *Ibid*. s. 46.

[131] *Ibid*. s. 48 (2).

[132] R.S.B.C. 1979, c. 86, s. 2.

[133] *See Rex* v. *Holsworthy Justices — Ex parte Edwards*, [1952] 1 T.L.R. 410 (K.B. *en banc*). There, the words "execution under the process of any Court of Justice" were in issue. Lord Goddard C.J. (Byrne and Parker JJ. agreeing), said at 411: "Serving a summons is not an 'execution under the process of any Court of justice;' it is simply serving a summons which is the commencement of process." *See also In re Overseas Aviation Engineering (G.B.) Ltd.*, [1963] Ch. 24 (C.A.) at 39-40, *per* Lord Denning M.R. This fine a distinction was not always made. *See, e.g., First Report made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law* (1829) at 85.

[134] *See Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 13.

[135] R.S.C. 1970, c. C-38.

[136] *Ibid*. ss. 7 and 8.

[137] *Ibid*. s. 8 (2). "Provincial court" is defined in s. 8 (1) of the Act.

[138] *See, e.g., Higgins* v. *Macdonald*, [1928] 4 D.L.R. 241 (B.C.C.A.); *Watson* v. *Murray & Co.*, [1955] 1 All E.R. 350 (Q.B.).

Is bonding of public service sheriffs a solution if the "fees" sheriff is not resurrected? Section 10 of the *Sheriff Act* permits the Attorney General to " . . . require a person employed for the purposes of [the] Act to post a bond pursuant to the *Bonding Act* for an amount and in a form he considers necessary." It is not the current practice of the Attorney General to require employees of sheriff services to post bonds.[141] As a result, when the government decides to support an errant employee, then the citizens of the Province pay. They pay much of the costs of sheriff services already. It is suggested[142] that the *Sheriff Act* should be amended to require all employees of sheriff services to post a bond for the due performance of their work.[143] The government can then assume the cost of "blanket bonds" to cover its employees, with the result that the cost to the public of mistakes would be limited to the price of the bonds.

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[139] *See Sheriff Services Operating Manual* at chapter 5, page 10. There is a precedent of sorts for the limitation which the government imposes by promising to grant indemnity only for wrongful acts done in the course of employment. In *Watt* v. *Ligertwood and Daniel*, (1874) L.R. 2 Sc. & Div. 361, a solicitor sued the sheriff-clerk and the sheriff-clerk-depute, alleging that the depute had wrongly ordered the solicitor's committal for contempt. At 366-7, Lord Chelmsford considered the question of whether Ligertwood, the sheriff-clerk, should have been joined as a party in the action and said at 366-7:

> He has power also to appoint deputies in the said office, for whom he shall be answerable. What is his deputy to do? He is to do what the sheriff-clerk may do, that is to say what he may lawfully do. This is alleged to be an illegal act on the part of the deputy, yet although he is only the deputy to do what the sheriff-clerk may lawfully do, it is argued that the sheriff-clerk is answerable for his unlawful acts. That is all that is necessary to be said. I do not think that Mr. *Ligertwood* ought to have been joined in this action at all . . . .

This information was gathered in conversation with Thomas Fox, who is a consultant on sheriff services in the provincial Ministry of Attorney General. Mr. Fox was formerly a "fees" sheriff in the Province. The same assurance has apparently been given to the sheriff in the State of Victoria: *see* the comment of Mr. Duncan, Deputy Sheriff at 37, in the *Minutes of the Australian Conference*, *supra*, note 38.

[140] In *Rex* v. *Stephen*, *supra*, note 115, Bigelow J. said at 566:

> I think it is an unfortunate situation in this Province that the public have no redress for a loss caused by the negligence of the sheriff's bailiff except as against the bailiff who may be a man of straw. But that is a matter for the Legislature and not the Courts.

His Lordship suggested that the maxim *respondeat superior* should apply.

[141] The cost is thought to be prohibitive. There was no mention of bonding in the Order in Council of 1856 for Vancouver's Island, *supra*, note 64, although provision was made in the *Sheriff's Act, 1860* for British Columbia , authorizing a judge, who had appointed someone to act as sheriff where the High Sheriff was not "in readiness," to take "such security for the due performance of his duties as the said Judge shall think proper." Section 5 of the *Sheriffs' Ordinance 1867*, R.S.B.C. 1871, No. 68 [5 March 1867] provided that it was lawful for the Governor of the united Colony to take security from the sheriff for the performance of his duties. Afterward there was a mandatory bonding provision in the legislation until the *Sheriffs Act*, R.S.B.C. 1960, c. 355 was repealed in 1976.

[142] It is questionable whether a government should ever have to bear the burden of a judgment awarded against a judgment-proof employee. If, as recommended in Chapter IX, "fees" sheriffs are restored, then they can insure themselves against their own defaults.

[143] Requiring public servants to give bonds to their employer is in some ways no less sensible than having bailiffs give bonds to their sheriffs. And that was the rule of practice for obvious reasons in England: "For if the sheriff be not liable, the party can only have recourse to the bailiff, who is unknown to him but who is well known to the sheriff; and therefore the sheriff knows his security; but the party does not." *Per* Grose J. in *Woodgate* v. *Knatchbull*, *supra*, note 107 at 86. Manitoba requires a bond: *The Sheriffs Act*, R.S.M. 1970, c. S-100, s. 3 provides:

> (1) No person shall execute any of the duties of the office of sheriff or deputy sheriff until he has given or furnished security to Her Majesty for the payment or making good of all loss which may result from any default, malfeasance, misfeasance, non-feasance, dishonesty, or neglect of duty committed by him.
>
> (2) The security furnished by or on behalf of any sheriff or deputy sheriff shall enure as well for the benefit of Her Majesty as for the benefit of any person who suffers loss or damage resulting from any default, malfeasance, misfeasance, non-feasance, dishonesty, or neglect of duty, committed by the sheriff or deputy sheriff.

Bonding should be accompanied by a reorganization of sheriff services to ensure that the possibility for mistakes is minimized. Some suggestions about reorganization are made later in this Chapter. As well, the *Sheriff Act* should be amended to provide that the government is liable for the wrongs committed in the course of employment by employees of sheriff services.[144] It would follow that section 2 (a) of the *Crown Proceeding Act*[145] should be repealed. If these changes were made, then the proper defendant in an action in which the mistake of a sheriff is alleged in the performance of a provincial responsibility would be "Her Majesty the Queen in right of the Province of British Columbia." Government employees could be joined as third parties if it were alleged that they acted outside the scope of their employment.[146]

These solutions are not untried. For example, in the Republic of South Africa, section 37 (1) of the *Supreme Court Act*[147] provides:

> The State shall be liable for any loss or damage resulting from any wrongful act performed by a sheriff or deputy-sheriff who is an officer of the public service or an assistant of such deputy-sheriff within the scope of his employment as such sheriff or deputy-sheriff or assistant or from any neglect of duty of such sheriff or deputy-sheriff or assistant.

And in South Australia, section 12 of the *Sheriff's Act*, 1978[148] provides:

> (1) Subject to this section, civil liability for any wrongful or negligent act or omission of the sheriff or a sheriff's officer in the course of carrying out duties assigned to him by or under this Act shall be determined in accordance with the law of torts.
>
> (2) The sheriff or a sheriff's officer incurs no personal liability in tort for any act or omission in the course of carrying out those duties.
>
> (3) Any action or claim to which the sheriff or a sheriff's officer would, but for subsection (2) of this section, be liable lies against the Crown.

In the Northern Territory of Australia, the Territorial Administrator is liable to "satisfy any judgment obtained against the sheriff, any officer of the sheriff or any other person for a wrongful act done or default committed by the sheriff or that officer of the sheriff or other person in the execution or intended execution of his duties under this Ordinance."[149] But provision is also made rendering the sheriff or officer on whose behalf a judgment has been satisfied liable to indemnify the Administrator unless the Attorney General of the Territory exempts the sheriff or officer in any particular case.

Adoption of provisions like those in effect in the Republic of South Africa and in Australia would make a good deal of sense. These provisions would admit the transmogrification of the entrepeneurial sheriff to public servant. They would also permit lawyers to know with some certainty what to advise their clients. As it is, they are not sure who to join as defendant or defendants. At present, they are tempted to adopt a "shotgun" approach and include anyone who might conceivably be held to be liable. Resort to that approach is objectionable because innocent people are put to trouble and expense.

A legislative amendment to clarify the question of liability would also be advantageous because, as things stand, it is not always possible to know just who is at fault in any particular case. For example, a writ of seizure and sale is not directed to any particular person[150] and may pass through several hands, and even through several offices, before it is executed, if it is executed at all. Historically, the "high sheriff" was easily identified and ease of identification may be one practical reason why he was always the responsible party. If the Crown (or to say the same thing[151]) the government, is made liable, identification would pose no problem.

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[144] For a provision imposing liability on municipalities for wrongs committed by policemen "in the performance of their duties," *see Police Act*, R.S.B.C. 1979, c. 331, s. 54.

[145] R.S.B.C. 1979, c. 86.

[146] *Ibid.* s. 7. Unless section 5 of the *Act* is also amended, actions against the Crown under the *Small Claim Act*, R.S.B.C. 1979, c. 387, would be prohibited.

[147] No. 59 of 1959.

[148] No. 82 of 1978.

[149] *Sheriff Act, 1980*, s. 23 (1).

What implications, if any, would the suggested change have for the trial process? As far as oral discovery is concerned, employees of sheriff services could be examined under Rule 27 (4) and (5) of the *Rules of Court*. But Rule 27 (6) would have to be amended to require the Crown to disclose, as other corporations[152] must now disclose, "the name of a person to be examined who is knowledgeable concerning the matters in question in the action."

There is no reason to impose any special limitation period within which actions against the Crown for the sheriff's defaults must be launched.[153]

3. "FEE-FOR-SERVICE" PROCESS SERVERS

There remains the status of "fee-for-service" process servers. These are the people appointed "as sheriffs"under section 2 (2) of the *Sheriff Act* to assist the regular deputies in serving civil process. The *Act* provides that the director of sheriff services and any sheriff authorized by him in writing may make the appointment, subject to the approval of the Attorney General. In practice, of course, only the director appoints. He does so by letter. In the letter, and arguably in accordance with section 2 (2), he authorizes "the Deputy Sheriff and Manager of Sheriff Services" of the district in which the person appointed is to do his work, to pay that person a fee from the money received by the Deputy and Manager for the service of the documents.[154] The letter also contains a statement that the director may rescind the appointment at any time on written notice.[155]

The director's letter contains the three constituents of control — the powers to appoint, to pay and to dismiss. Does the principle of *respondeat superior* apply to render the Attorney General and the director (or a sheriff) liable for the wrongs of those who are appointed? The argument that they are — because they exercise control — is not necessarily far-fetched. It could be said that section 10 of the *Sheriff Act*, which permits the Attorney General to require a bond, is evidence of the Legislature's intention that the maxim should apply. It is unlikely, however, that a court would impose liability on the basis of the principle of *respondeat superior*. Neither the Attorney General who approves, nor the director or sheriff who makes the appointment, derive any benefit or profit from the work done by the person appointed. Profit was the thing not mentioned but certainly implied in all but one case in the series that rejected application of the principle of *respondeat superior* in Canada.[156] In *Hall* v. *Smith*,[157] advantage was emphasized:

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[150] *See* Form 42 in Appendix A to the *Rules of Court*, which is simply addressed "To the Sheriff," as it has been for centuries: *see, e.g., Gibbons* v. *Roberts* (1689-1712) 1 Salk. 266, 91 E.R. 233: "for the Writ is to the sheriff as sheriff, and not to him by this or that name . . . ."

[151] *See* Law Reform Commission of British Columbia, *Report on the Crown as Creditor: Priorities and Privileges* (LRC 57, 1982) at 3, where the opinion is expressed that in this Province the Crown *is* the government.

[152] *See Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29, which excludes Her Majesty and the Lieutenant Governor from the definition of "corporation" while admitting their existence as corporations sole.

[153] There are special limitations in some places. *See, e.g., Sheriff Act*, N.T. (Aust'l.), 1980, s. 24 (six months); *Supreme Court Act*, W. Aust'l., 1935, No. 36, s. 161 (12 months); *Civil Process Act, 1870*, Tas., 34 Vict. No. 17, s. 10 (3 months); *Supreme Court Act*, So. Australia, No. 59 of 1959, s. 37 (3) (six months).

[154] The power to appoint includes the power to pay in any event: *see* s. 22 of the *Interpretation Act*, R.S.B.C. 1979, c. 206. The money received by the Deputy and Manager for the service of the documents is the fee prescribed by Schedule 2 of Appendix C to the *Rules of Court*.

[155] The director has the power of removal under s. 22 of the *Interpretation Act, ibid.*

[156] The exception was *Larkin* v. *McNutt, supra*, note 72. There it was express. *See, e.g.*, what Peters J. said at 311.

[157] *Supra*, note 105 at 267, *per* Best C.J.

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3. "FEE-FOR-SERVICE" PROCESS SERVERS

There remains the status of "fee-for-service" process servers. These are the people appointed "as sheriffs"under section 2 (2) of the *Sheriff Act* to assist the regular deputies in serving civil process. The *Act* provides that the director of sheriff services and any sheriff authorized by him in writing may make the appointment, subject to the approval of the Attorney General. In practice, of course, only the director appoints. He does so by letter. In the letter, and arguably in accordance with section 2 (2), he authorizes "the Deputy Sheriff and Manager of Sheriff Services" of the district in which the person appointed is to do his work, to pay that person a fee from the money received by the Deputy and Manager for the service of the documents.[154] The letter also contains a statement that the director may rescind the appointment at any time on written notice.[155]

The director's letter contains the three constituents of control — the powers to appoint, to pay and to dismiss. Does the principle of *respondeat superior* apply to render the Attorney General and the director (or a sheriff) liable for the wrongs of those who are appointed? The argument that they are — because they exercise control — is not necessarily far-fetched. It could be said that section 10 of the *Sheriff Act*, which permits the Attorney General to require a bond, is evidence of the Legislature's intention that the maxim should apply. It is unlikely, however, that a court would impose liability on the basis of the principle of *respondeat superior*. Neither the Attorney General who approves, nor the director or sheriff who makes the appointment, derive any benefit or profit from the work done by the person appointed. Profit was the thing not mentioned but certainly implied in all but one case in the series that rejected application of the principle of *respondeat superior* in Canada.[156] In *Hall* v. *Smith*,[157] advantage was emphasized:

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[150] *See* Form 42 in Appendix A to the *Rules of Court*, which is simply addressed "To the Sheriff," as it has been for centuries: *see, e.g., Gibbons* v. *Roberts* (1689-1712) 1 Salk. 266, 91 E.R. 233: "for the Writ is to the sheriff as sheriff, and not to him by this or that name . . . ."

[151] *See* Law Reform Commission of British Columbia, *Report on the Crown as Creditor: Priorities and Privileges* (LRC 57, 1982) at 3, where the opinion is expressed that in this Province the Crown *is* the government.

[152] *See Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29, which excludes Her Majesty and the Lieutenant Governor from the definition of "corporation" while admitting their existence as corporations sole.

[153] There are special limitations in some places. *See, e.g., Sheriff Act*, N.T. (Aust'l.), 1980, s. 24 (six months); *Supreme Court Act*, W. Aust'l., 1935, No. 36, s. 161 (12 months); *Civil Process Act, 1870*, Tas., 34 Vict. No. 17, s. 10 (3 months); *Supreme Court Act*, So. Australia, No. 59 of 1959, s. 37 (3) (six months).

[154] The power to appoint includes the power to pay in any event: *see* s. 22 of the *Interpretation Act*, R.S.B.C. 1979, c. 206. The money received by the Deputy and Manager for the service of the documents is the fee prescribed by Schedule 2 of Appendix C to the *Rules of Court*.

[155] The director has the power of removal under s. 22 of the *Interpretation Act*, *ibid*.

[156] The exception was *Larkin* v. *McNutt*, *supra*, note 72. There it was express. *See, e.g.*, what Peters J. said at 311.

[157] *Supra*, note 105 at 267, *per* Best C.J.

> The maxim of respondeat superior is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.

Under current arrangements, neither the Attorney General nor the director nor a sheriff will ever enjoy any direct advantage from the work done by those who may be appointed "as sheriffs" under section 2 (2).[158] All advantage, at least notionally, redounds to the Crown. For that season, what the "fee-for-service" appointees do is not "the sheriff's work" but their own.[159]

It is an easy thing to make it clear by statute that those who appoint the temporary deputies for the purpose of serving process are not to be responsible for them.[160] An amendment would avoid the costly alternative of calling in aid the machinery of the Public Service Commission in order to make the appointments. For that reason, the *Sheriff Act* should be amended to make manifest the superiors' exclusion from liability. Section 10 should also be amended to provide that all the temporary deputies be required to post a bond or to give some security for the proper performance of the jobs which they are asked to do.

F. Qualifications and Training

1. QUALIFICATIONS

Certainly before the Norman Conquest[161] and probably down to the time of *Magna Carta*, practically the only qualification demanded of a prospective sheriff was that he be loyal to the King.[162] And even that was not always assured.[163] The Great Charter[164] introduced the requirement that the sheriffs, along with others, "know the law of the realm." This provision did not stem (as it has been suggested[165]) from a wish of the Barons that all the sheriffs be lawyers,[166] but rather from a demand that King John appoint fewer foreigners to the office.[167] Early in the fourteenth century, another statutory provision appeared which required each sheriff to "have sufficient land within the same shire where he shall be sheriff to answer the King and his people,"[168] "in case any man shall complain against him."[169] This qualification was written into the consolidated *Sheriff's Act*, 1887[170] and remains there today, although it has been suggested for some time now that it is there no less for the protection of the people than for the protection of the sheriff himself, who may find the office financially burdensome.[171] Still, it is some evidence — a legislative recognition — that things can go wrong. Apart from the fact that the sheriff in England must be "landed," there are no other requirements for the office.[172] It need not be filled by a male[173] and can even be served by an infant.[174]

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[158] As the "supervisors," they may obtain an indirect advantage because more work will be done if "fee-for-service" people are appointed, but that advantage may come at the risk of the suggestion that the supervisors do not make the best use they could of the regular staff.

[159] *See Reum* v. *Rutherford*, *supra*, note 115 at 718, per Lamont J:

> . . . The work which the Lieutenant-Governor-in-Council appoints a deputy sheriff and the staff of a sheriff's office to perform cannot be considered the work of a sheriff, and, if it is not his work, he cannot be held responsible for the failure of some one else to perform, not his work, but their own.

[160] That is not the only solution. The Crown could assume liability in the manner suggested for regular employees.

[161] *See* Morris, *supra*, note 15 at 37; I. Gladwin, *The Sheriff: The Man and his Office* (1974) at 20 ("men of a special calibre whom the king could trust"); and Mather, *supra*, note 33 at 2.

[162] The incumbents were usually, but not always, landholders: *see* Morris, *supra*, note 15 at 35.

[163] *Ibid.* at 36. Today, the sheriffs in England must declare that they will "well and truly serve the Queen's Majesty." The declaration is required by s. 7 (1) of the *Sheriff's Act*, 50 & 51 Vict., c. 55. The form of the declaration can be found in The Second Schedule to the *Act*.

[164] *See*, *e.g.*, cap. 45 of "The Text of Magna Carta," trans. G.R.C. Davis, which is found as an Appendix to I. Jennings, *Magna Carta* (1975).

[165] W. Stubbs, 1 *The Constitutional History of England* (4th ed., 1883) at 578.

[166] It was not unheard of for the sheriff to be a lawyer, but it was unlikely: *See* H. Cam, *Law-Finders and Law-Makers in Medieval England*, (1962) at 134, where the author mentions an illiterate sheriff in 1298 who had been duped by an educated clerk. *And see* C.H. Karraker, *The Seventeenth-Century Sheriff. A Comparative Study of the Sheriff in England and the Chesapeake Colonies 1607-1689*, (1930) at 12: "The under-sheriff was expected to know some law, 'especially if the sheriff be not learned himselfe'." Atkinson, *supra*, note 29 at 5, went so far as to say of the sheriff: "The law . . . intends him to be a lay person, and to have no skill in the science of the law . . ." Maitland, *supra*, note 8 at 71-2, said that on an execution "the sheriff himself will know very little" about the "rules to be observed." *See also* Derriman, *supra*, note 30 at 112: "the sheriff was never required to be a lawyer or even a man of learning."

[167] *See* W.S. McKechnie, *Magna Carta* (2nd ed., 1914), at 433-5 and *see* Morris, *supra*, note 15 at 159. Morris suggests that there were not as many foreigners as is popularly supposed.

[168] *The Statute of Sheriffs*, 9 Edw. II, St. 2 (1315).

[169] *See* M. Dalton, *Officium Vicecomitum or The Office and Authoritie of Sherifs*, (1623) at 2. The statutory requirement led Dalton to present his book: for the "better incouragement of the Gentrie (upon whom the burthen of this Office lyeth)." "What constitutes a sufficiency of lands, within the meaning of the statute, is not definitely laid down . . . :" *see* Churchill, *supra*, note 61 at 19.

There are no special qualifications for the office of under-sheriff in England, except that whoever is named by the sheriff must be a "fit person."[175] In practice, he or she is invariably a solicitor.[176] Persons with some training in the law have been engaged as under-sheriffs since early in the fifteenth century at least.[177]

In British Columbia, no qualifications other than that of citizenship[178] and a "loud voice"[179] are established by statute for any of the jobs which fall under the umbrella of sheriff services. The Public Service Commission is prohibited by the *Human Rights Code*[180] from discriminating amongst prospective employees on grounds of sex[181] or age.[182] It is therefore possible for women to be employed on an equal footing with men and for deputies to be hired who have not yet reached the age of majority.[183] Employment can be refused where an applicant has a criminal record. For the same cause, continued employment or advancement can be denied to a serving deputy.

The director of sheriff services is appointed by the Public Service Commission, usually on the written request of the Deputy Attorney General. There are no formal criteria for the job. Legal training is not a prerequisite. Since 1973, only one of the three directors has been a lawyer.[184]

There is no requirement of sheriff services that the regional managers be legally trained, although it is expected that they will have either a university degree in "an appropriate discipline" or its equivalent in "training and work experience at the management level."[185] Much the same is expected of district managers. Their degree is to be in "related subjects," or they are to have a "diploma in public administration." The local managers — these are the first people down the hierarchy to be appointed as deputy sheriffs — must have completed secondary school "or equivalent." They are expected to have "an excellent knowledge of legislation and thorough knowledge of Court Services procedures and organization."

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[170] 50 & 51 Vict., c. 55, s. 4.

[171] In *Graham* v. *Grill*, (1814) 2 M. & S. 294, 105 E.R. 391, 392 Lord Ellenborough C.J. said: "There are many onerous duties cast on the sheriff, for which the law has not provided distinctly any remuneration, and this is one reason for appointing men of substance to the office, that they may be able to bear those duties." *See also* Atkinson, *supra*, note 29 at 6, Churchill, *supra*, note 61 at 19, and Karraker, *supra*, note 166 at 3.

[172] Some people cannot hold the office: *see* Gladwin, *supra*, note 161 at 377, and Beaumont, *supra*, note 31 at 9.

[173] "There is no legal bar to prevent a woman becoming a sheriff . . . :" *see* Gladwin, *supra*, note 161 at 377. There is evidence that a woman held the office as early as 1300: *see* Morris, *supra*, note 15 at 181-2. *See also* Co. Inst. 326a, note (c) to *Mitton's Case*, (1584) 4 Co. Rep. 32b, 76 E.R. 965, 967, and Atkinson, *supra*, note 29 at 5-6.

[174] By "descent" at least: *see Young* v. *Fowler*, (1640) Cro. Car. 555, 79 E.R. 1078, 1079 and *Claridge* v. *Evelyn*, (1821) 5 B. & Ald. 81, 106 E.R. 1123, 1125. *See also* Beaumont, *supra*, note 31 at 10. But an infant cannot be a bailiff or sheriff's officer: *Cackson* v. *Winter*, (1828) 2 Man. & Ry. K.B. 313, 317. No authorities could be found about infants and the job of under-sheriff.

[175] *Sheriff's Act, 1887*, 50 & 51 Vict., c. 55, s. 23(1).

[176] *See* Watson, *supra*, note 32 at 33 ("some attorney of respectability"); Churchill, *supra*, note 61 at 33 ("a solicitor of respectability"); Maitland, *supra*, note 8 at 71 ("some solicitor of high standing"); D. Boland, "The Ancient Office of Sheriff" (1951) 211 L.T. 177, at 179 ("usually a solicitor"); Derriman, *supra*, note 30 at 114 ("usually a solicitor"); Beaumont, *supra*, note 31 at 10 ("usually a solicitor of standing"); Gladwin, *supra*, note 161 at 376 ("always a solicitor").

[177] By 1 Hen. V, c. 4 (1413), "attornies" were prohibited from practising the profession as long as they acted as under-sheriffs. To let them practise would be "a great inlet to partiality and oppression:" *see* 1 Bl. Com. 345. The prohibition was repealed by 1 Vict., c. 55 (1837). *See also* Karraker, *supra*, note 166 at 12, for mention of legally trained under-sheriffs in 1606.

[178] *The Public Service Act*, R.S.B.C. 1979, c. 343, s. 34 requires the Public Service Commission to appoint Canadian citizens. Other people can be appointed temporarily if "no qualified Canadian citizen applies."

[179] To read the "Riot Act." *See* the discussion of s. 68 of the *Criminal Code*, R.S.C. 1970, c. C-34, in Chapter V.

[180] R.S.B.C. 1979, c. 186, s. 8.

[181] In practice, there is some division of responsibilities between male and female deputies. For example, while both male and female deputies work escorting prisoners, neither group ordinarily searches prisoners of the opposite sex for weapons.

[182] "Age" is defined in s. 1 of the *Human Rights Code*, R.S.B.C. 1979, c. 186, to mean: "an age of 45 years or more and less than 65 years."

[183] Women seem to be advancing in sheriff services. Several women are now supervising deputy sheriffs: *see* the letters from A. Pickering and W.J. Wunderlich in (1980) 3 Forum, (Issue 5) at pp. 18-9. These letters were written as responses to a letter of complaint from C.L. Hunt about sheriff services practice concerning women in supervisory positions: *see* (1982) 3 Forum (Issue 3) at 15-6. The provisions about children in the *Employment Standards Act*, R.S.B.C. 1979, c. 107, do not apply: *see* the definition of "employment" in s. 22.

[184] Arrangements in other jurisdictions are discussed later in this section.

There are three classes of deputy sheriffs.[186] They are designated 3, 2 and 1 in decreasing order of responsibility. A deputy sheriff 3 will have supervisory responsibilities, either as a section head[187] or supervisor in an office where a local manager is present, or as supervisor of a smaller (likely rural) office to which a district manager will come from time to time. A deputy sheriff 3 must have completed secondary school "or equivalent," and preferably will have had supervisory training and will have completed a "Correspondence Course in Public Administration or equivalent." This deputy must have "an excellent knowledge of statutes, regulations and the basic responsibilities of the sheriff's program" and "an excellent knowledge of the courts and justice systems." It is also required that the deputy have completed the Sheriffs Basic Training Course.[188] None of the others above him on the hierarchy need have done so.

A deputy sheriff 2 will have "senior duties," as "administrator" of a "single employee office," as a section supervisor or as a shift supervisor. "Secondary school graduation or equivalent" is required, "preferably supplemented with supervisory courses." There must be "a good knowledge of statutes, regulations and responsibilities pertaining to sheriff services" and "of the courts and justice systems." "Basic Training" is a prerequisite to employment.

Little less is demanded of the deputy sheriff 1. These are the "workers." They serve the documents, manage the witnesses, empanel the juries, seize the goods and escort the prisoners. "Secondary school graduation or equivalent" is mandatory but only "some knowledge" is required "of pertinent statutes and regulations, sheriffs' programs, and the court and justice systems." The Basic Training Course must be completed.

All the deputies must meet "approved medical standards" and have a motor vehicle driver's licence of a class for which special training is required. They must all have the "[a]bility to use good tact and judgment, combined with firmness when directing others" and they must be "mature and emotionally stable in order to control hostile and dangerous behaviour." All of them must be able "to communicate," — the deputy sheriffs 3 "effectively," and the others "with the public and other officials." In addition, before they are recruited, candidates must complete a "pre-entry physical test", achieve a "minimum standard" on job related skills (trigger pull, body drag, wall scale, stretcher carry) and "a 40% grade" on physical and motor fitness evaluation (strength, muscular endurance, cardiovascular endurance, motor fitness ability).[189]

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[185] All of the information about the qualifications for regional, district and local managers has been taken from Public Service Commission notices, *i.e.*, postings of vacant positions.

[186] All of the information about the qualifications for deputy sheriffs has been taken from the Government Employee Relations Bureau listings dated July 1979.

[187] Each of the larger offices has two or more sections. Each section has at least one responsibility, *e.g.*, serving civil process, serving criminal process, levying execution, managing juries, escorting prisoners, providing court security.

[188] Training is discussed in the next section of this chapter.

[189] *See Sheriff Services Operating Manual*, chapter 2, page 28.

Sheriff's officers must have reached Grade 10 in school and should have knowledge of "security routines" and of the court system of British Columbia. They are expected to understand human behaviour and to be emotionally stable and mature. Often, they are retired police or military people. Of course there are also clerks and stenographers in sheriff services whose qualifications are those to be expected for the positions.[190]

It follows from these descriptions that no one in sheriff services with the possible exception of the director need be a lawyer and that it is unlikely that anyone will in fact be legally trained. The same may be said of most other Provinces in Canada and of some parts of the Commonwealth, for example, Saskatchewan, Manitoba, Prince Edward Island, New Brunswick and the State of Victoria. It may not be said of Quebec, where in 1980, 19 of the 35 people who did sheriff's work were lawyers. But they were "justice officers," with duties to perform which deputy sheriffs here never undertake. In Ontario, in 1981, there were 49 sheriffs, 49 senior deputy sheriffs, 60 junior deputy sheriffs and a number of sheriff's officers paid on a "fee-for-service" basis. None of these officials was legally trained. In Scotland, none of the sheriff's officers are lawyers, but the sheriffs who supervise them are "judges recruited mainly from the Faculty of Advocates (the Scottish Bar) or from solicitors, of a prescribed number of years standing."[191]

In Australia, the counterparts to British Columbia's director are the sheriffs in each State. They do much the same work as sheriff services does. In 1981, a Tasmanian official wrote to say:[192]

> The sheriffs in Australia are presently almost equally divided between persons with formal legal qualification, and those without such qualifications. Generally, the longest serving Sheriffs are without such qualifications and the more recently appointed ones have legal qualifications. It should be noted that those Sheriffs without formal legal qualifications nevertheless are steeped in Sheriff law and are generally more knowledgeable in that branch of the law than most legal practitioners. However, it would appear that the trend is toward appointment of persons with legal qualifications to the position of the Sheriff in this country.

In British Columbia, legal advice is available to those who do the work of the sheriff from a staff lawyer[193] in the Ministry of the Attorney General at Victoria. But the adviser has many other responsibilities and, although it is difficult to estimate, he may spend as little as five per cent of his time advising sheriff services *simpliciter.*[194] Because he has other responsibilities, he is neither expert in the law relating to the office of sheriff nor always available to give prompt advice. In one recent case, deputy sheriffs in one city had seized perishable goods and sought advice about the speed with which they were entitled to sell them. When they were told that the Victoria lawyer would not be available to help them for several days, they were placed in an awkward position because they had standing instructions from the Ministry not to apply to the Court for directions without Ministry approval, as they might otherwise have done under Rule 42 (26) and Rule 43 (4) of the *Rules of Court*.

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[190] *See* note 92, *supra*.

[191] Letter from N.R. Whitty, of the Scottish Law Commission. *See also* generally Scottish Law Commission, *Fifth Memorandum on Diligence: Administration of Diligence* (Memorandum No. 51), October 1980.

[192] Letter from the deputy registrar of the Supreme Court and Sheriff's Department, Tasmania.

[193] No one in the field in British Columbia has authority to retain a lawyer, *e.g.*, for interpleader proceedings: *see* Court Services Circular C.S.S. 6/78, 25 May 1978. Saskatchewan, Manitoba, Quebec, New Brunswick, and Prince Edward Island and the State of Victoria apply the same rule.

[194] There is one public service lawyer in each of Saskatchewan, Manitoba and New Brunswick who gives advice to those who do the work of the sheriff. In Saskatchewan, the work occupies 40 per cent of the lawyer's time, and in Manitoba, 5 to 10 per cent. There are three public service lawyers advising three sheriffs and three deputies in Prince Edward Island. Only one per cent of the lawyers' time is spent giving the advice. In Quebec, two lawyers for each of the 11 administrative regions in the Province are available to give legal advice to "justice officers." In Ontario, the Director, Crown Law Office—Civil, is responsible for advising the sheriffs. No specific lawyers are assigned and no statistics are kept of the

A consultant to sheriff services occasionally sends Court decisions of note to supervising deputies but there is no regularity to this dissemination. In a recent and not uncommon instance, two months passed between the date of a judgment which affected sheriff practice and the date on which it was received by the deputies. No one in the Ministry of Attorney General seems to be monitoring cases and no bulletin is released regularly with interpretations of, or commentaries on, relevant decisions.

A solicitor with the provincial Ministry of Consumer and Corporate Affairs has lately been assigned to act as counsel in all cases in which the sheriff applies for interpleader relief. However, the deputies have no direct access to this solicitor, who is approached on their behalf by the advising lawyer in Victoria.

This description of the local situation is in sharp contrast to the way things are in England. There, as it has been said, it is customary to appoint a solicitor as under-sheriff.[195] Indeed, in 1888 it was said of the office of high sheriff: "No man without some knowledge of the law . . . is fit to take the position."[196] Maitland said it with less rhetoric in 1885:[197]

> In theory, a sheriff, in practice an undersheriff, has much business to do which requires experience of legal routine. In particular, civil execution, though less hazardous than it was a few years ago, is still risky work.

More recently, in 1980, as part of an English study of European enforcement officials, it was said:[198] "Most under-sheriffs are solicitors; this is almost

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time spent giving advice. In the State of Victoria, the sheriff and his deputies are advised by staff Legal Officers under the Crown Solicitor. Requests for advice receive priority but they are infrequently made. In Queensland, one of three sheriffs and most of the deputy sheriffs are solicitors. If legal advice were required, it would be obtained from the Office of the Solicitor General for the State. In New South Wales, the sheriff is legally qualified and is available for immediate advice, as is the Crown Solicitor's office. In Western Australia, according to Kevin Parker, the Solicitor General, "[a]dvice to Sheriff's officers [of whom there are 123] in execution of process is given by the Sheriff. As and when required the Sheriff seeks legal advice from the Crown Solicitor which may be once or twice a year. It is difficult to estimate the amount of time the Sheriff spends in giving advice on executions. In the metropolitan area where the Sheriff's officers operate from the same office there are daily consultations. Approximately twenty to thirty requests for advice from county officers are received each week." In the Northern Territory of Australia, the Master of the Supreme Court and his deputy are both legally qualified and are available to give legal advice. They spend less than 5 per cent of their time doing so, but only about 120 writs of *fi.fa.* are executed there each year. (In British Columbia, the number is about 6,000.) For the High Court of Australia, either the Clerk or the Registrar of the Court (both of whom are legally qualified) are available to give legal advice, but in 1981 no estimate of the time spent doing so could be given. As for the Supreme Court of the Australian Capital Territory (for which in 1982 there was a sheriff, two deputies and seven officers), legal advice is available from the Deputy Crown Solicitor's office but the sheriff also seeks guidance from the sheriffs of New South Wales and Victoria. Little time is spent by anyone giving advice and advice is only needed on "several occasions" a year. In New Zealand, the office of sheriff is held concurrently with that of Registrar of the High Court, but the incumbents in 1981 were not legally trained. The Deputy Secretary of Justice for New Zealand wrote that it was not possible to say how much time was spent giving legal advice to the sheriffs but that it was "generally accepted it would scarcely exceed one hour a year for the whole country." Any advice is given by the Crown Solicitor or by lawyers at the Head Office of the Department of Justice. In France, huissiers (court enforcement officers) must have worked three years as a trainee in a huissier's office unless they have graduated with one of the two highest degrees from a law faculty, in which case their apprenticeship is two years. No one may be appointed as a trainee who has not been granted either a degree at (at least) the lowest level by a Law Faculty or a diploma by the Ecole National for Procedure, an institute financed wholly by the National Chamber of Huissiers, a private organization which represents the whole of the profession. This information was conveyed by M. Fernand Gremont, a former (and now honourary) member of the Permanent Council of the Union International des Huissiers de Justice et Officiaires Judiciares, a body with representatives from France, West Germany, Belgium, The Netherlands, Luxembourg, Italy, the Swiss canton of Geneva, Greece, Scotland, Austria, The Malagasy Republic, Gabon, Upper Volta and the Province of Quebec. For a comprehensive examination of huissiers in France, *see* Martin, *Study of the Profession of Huissiers de Justice*, *supra*, note 61, Part B. At Part B, section 18, para. 18.1, Martin says that it " . . . is estimated that approximately half the number of prâctising huissiers are law graduates." *See also*,Martin's "A Comparative Study of Enforcement in England and France," *supra*, note 65 at 224. For a statement of the qualifications required of huissiers in France, *see Conditions d'Acces Journaux Officiels*, Paris, 1975. In the Province of Transvaal, Republic of South Africa, the sheriff, who is a public servant and who is essentially a figurehead, occasionally gives legal advice to the deputies, who are private contractors and many of whom are practising lawyers in any event.

[195] *See* text at note 176, *supra*. That is the case in the High Court. In the County Courts, every district has a registrar who is appointed by the Lord Chancellor. Each registrar, who must be a solicitor of at least seven year's standing, is responsible for the issuance and service of all process and for the execution of all warrants and orders of commitment which may be issued or received by his court. In practice, bailiffs do the work of execution and the registrar is responsible for their acts and defaults as if he were a sheriff of a county: *see County Courts Act*, 1959, 7 & 8 Eliz. II, c. 22, ss. 21 (1), 28, 163.

[196] *See* the evidence of Sir Baldwyn Leighton in the Minutes of Evidence accompanying the *Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 33 at 20. *See also* the evidence of Mr. C. De L. Faunce De Laune, at 31 (he had been High Sheriff of Kent): "I might as well think I was capable of being a judge as of fulfilling the legal duties of sheriff." It is apparent from reading the evidence of his under-sheriff, Mr. Frederick Scudamore, (who had been under-sheriff for 24 years), that Mr. Faunce De Laune had had a particularly unhappy time as sheriff: *see*, *e.g.*, the letter reproduced at 96.

[197] Maitland, *supra*, note 8 at 71.

[198] Martin, Study of the *Profession of Huissiers de Justice*, *supra*, note 61 at para. 2.6.

essential as levying execution often results in litigation, the commonest form of which is interpleader." In England the same solicitor will do the job of undersheriff for many years, as each new sheriff elects to reappoint him to take advantage of his experience.[199] In England, therefore, there is a person in each county, at a level equivalent, say, to the district manager in British Columbia, who is specially qualified to scrutinize the way in which duties are discharged by bailiffs and sheriff's officers and to give them immediate legal advice when necessary.

In this Province, neither the sheriffs nor the under-sheriffs or deputies have ever, as a matter of history[200] or policy, been legally qualified. That is not surprising, because when steps were first taken[201] to provide for the administration of justice in the Colonies, there were "no lawyers immediately available."[202] So the job of sheriff fell, for the most part, to people who had not read the law.[203] Things did not change much with time. The way in which the important executive and judicial positions in British Columbia were passed from hand to hand in the second half of the nineteenth century by the few lawyers there were in the Province is almost comical; it testifies to the premium placed on those with legal skills.[204]

The important point to be made is that this Province, unlike England, has never had a tradition of legally trained supervisors overseeing the work of the office of the sheriff. Here, the director of sheriff services and the regional managers in British Columbia, like their counterparts in England — the high sheriffs — have nothing but a passing knowledge concerning the technical legal aspects of what those under their supervision do.[205] Yet here the sheriff does much more than the sheriffs do in England.

The absence over the years of supervising lawyers in this Province has produced the unfortunate consequence that the public has never been particularly well served. This is not to say that the sheriffs and officers of the past were not diligent or knowledgeable, or that lawyers were not hired when problems arose. But without the daily supervision of someone trained in the law, the sheriffs probably never knew that they could give, and the public never knew that it was entitled to expect, something better.[206] This history may explain why today the Attorney General's staff lawyer responsible for advising sheriffs still spends such a small part of his time doing so: no one has realized the potential of the position. When the number of sheriff's duties was increased in the 1970s, no real thought seems to have been given to the increased provision of legal advice.

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[199] *See* para. 12 of the *Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 33 at V, VI.

[200] A.C. Elliott, who was the first High Sheriff of the united Province, was an exception. He was a member of the Bar and was Magistrate of the Lillooet District until his appointment as sheriff on 18 February 1867: *see* D.M.L. Farr, "The Organization of the Judicial System in the Colonies of Vancouver Island and British Columbia, 1849–1871" (1967) 3 U.B.C. L. Rev. 1, at 27-8 *and see* a letter dated 14 February 1867 from the Colonial Secretary to Elliott, in which the position of sheriff is offered. The letter is on microfilm in the Provincial Archives at Victoria, under No. F521. Elliott was Premier of the Province from 1876 to 1878: *see* F. W. Howay, 2 *British Columbia* (1914) at 669 and S.W. Jackman, *Portraits of the Premiers* (1969) at 43–50. One point should be made about Farr's research, which appears otherwise to have been meticulous: at 20, he says that Peter O'Reilly probably held the position of sheriff of the colony of British Columbia from his appointment in 1860 until 1867. But it seems that his appointment in fact came to an end in 1866, because on 23 April 1866, *The [Victoria] Daily British Colonist* reported at 3, under the heading "Deputy Sheriff of British Columbia" that "Mr. Homer has assumed his duties as High Sheriff of the neighbouring colony." "Mr. Homer" was J.A.R. Homer, who seems to have been re-appointed in October of the same year: *see* "Appointments," *The [Victoria] Daily British Colonist* 16 October 1866 at 3.

[201] With the Order in Council of 4 April 1856: *supra*, note 64.

[202] *See* A. Watts, Q.C., *History of the Law Society of British Columbia 1869–1973* (1973) at 25. It was 1858 before the first barrister and the first solicitor began to practise. There was no Attorney General until May 1859 (*see* D.R. Williams, *The Man for a New Country* (1977) at 149) and there were only 22 lawyers in the whole Province in 1869 (Watts, at 28).

[203] That candidates for sheriff were not necessarily considered on their merits is clear from two early newspaper reports. In the *British Columbia Tribune* (published at Yale) for 10 April 1866, under the heading "Official Changes," at 2, there is a call that "sinecures must be abolished." And in *The [Victoria] Daily British Colonist*, for 9 January 1867, under the heading "Removal of the Sheriff," at 3, it is said that Mr. Adamson was to leave office: "Changes necessary under the Act of Union are assigned. . . . If his removal be necessary to carry out the general retrenchment scheme of His Excellency [the Governor], no complaint will be heard; but if it be intended to make room for some 'court favorite' by dismissing Mr. Adamson, the change is nothing less than an outrage."

[204] *See* generally, Williams, *supra*, note 202.

[205] In England in 1888, it was said in para. 11 of the *Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 33 at IV that:

> The High Sheriff knows little of what the extent of his duties is. Nearly all that he himself does is to attend upon the Judges at Assizes. He is practically obliged to leave everything beyond in the hands of his Under Sheriff.

In Chapter VII, there appears a discussion of the sheriff's responsibilities when executing the courts' process. That discussion underscores the present inadequacy of the current administrative structure in sheriff services. Provision must be made for ready access to legal advice. If it is seen fit not to take up the recommendation made in Chapter IX to transfer responsibility for the office of sheriff from the executive to the judiciary, then it is suggested that for each of the 14 administrative districts in the Province, lawyers with special knowledge of the law relating to sheriffs be appointed or retained to advise all employees in sheriff services. This need not be their exclusive responsibility, but they should be experts in the kinds of problems the deputy sheriffs are likely to face and should be ready to respond immediately when questions arise. District lawyers would bring to the job of supervision things which people who have never practised law could not possibly bring. They would, for example, fully appreciate the consequences of the untimely or improper service of documents. They would always know what can be seized and what cannot. They would have been trained to show concern about invading civil liberties, but be sensitive to the rules which justify interference in appropriate circumstances. Perhaps most important, they would know how to avoid legal problems rather than just to respond to them.

This recommendation should not be rejected on grounds of budget alone. The lawyers should be free to do such other work as will not interfere with their responsibility to serve the sheriff. Because there will be other things for these lawyers to do — in the government service, if they are staff lawyers in the Ministry of Attorney General, or the work of other clients if they are retained from private practice — the cost of providing the service should not be burdensome. In any event, the problem is larger than than the question of economy because the Province must have an office of sheriff, or something like it.[207] If that proposition is accepted, it must follow, in order to avoid false economy, that the best possible use of the office should be made. That will happen with effective employment of experts.

2. TRAINING

It is proper to say that more is done now than has ever been done before in British Columbia[208] to ensure that the people who do the work of the sheriff are knowledgeable. It is also proper to say that much of what is done is still no more than rudimentary. A "Deputy Sheriff's Program"[209] (called "Basic

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[206] As far as that goes, the lawyers, who are as much a product of the history of the Province as are the sheriffs, have not in their own right given much help. But it has been said elsewhere that it is not entirely their fault: *see* Turriff, *supra*, note 9 at note 14. Things have improved even since that article appeared. Messrs. Trebilcock, Reiter and Laskin have produced *Debtor and Creditor: Cases, Notes, and, Materials* (1979) (a good basic collection) and 1981 saw the publication of Professor C.R.B. Dunlop's long-awaited text, *Debtor-Creditor Law in Canada*.

[207] The need for the office is discussed in Chapter V.

[208] British Columbia seems to have led the way in sheriffs' training in Canada. There is a course of training in Ontario and programs were being developed in Alberta, Saskatchewan and Manitoba during 1981. Manuals for use by people in the field have been prepared in Ontario and Saskatchewan. In New Brunswick, there is no formal training although there is a "sheriff's manual which must be studied by all new employees." There is "very little training" in Prince Edward Island. The absence of a formal training program for sheriff's officers in Scotland was noted by the Scottish Law Commission in its *Fifth Memorandum on Diligence*, *supra*, note 191 at 23, para. 3.3.

[209] Successful completion of the program is required of all newly recruited deputy sheriffs: *see* Court Services Circular 1/80, 12 May 1980, at 1 and *Sheriff Services Operating Manual* at 2-65.

Training" by the Court Services Branch of the Ministry of Attorney General) is usually conducted twice each year[210] by the Justice Institute of British Columbia.[211] The Institute, which is a Crown Corporation, advertises itself as "a post-secondary educational facility" which "provides training and educational programs and services for people working within the fields of justice and public safety" in the Province.[212] Deputy sheriffs are recruited by the court services division and then enter the next scheduled "basic training" course. From the time of their recruitment, they are employees of the government. They are paid during the period of training which they undergo.

A staff development officer employed by the court services division is responsible for setting the curriculum under the general supervision of the Institute's director and with the assistance, since the Fall of 1981, of a staff lawyer. The officer is a deputy sheriff who has been seconded from sheriff services. It is the Institute's policy to second. The officer is not a lawyer. He has an assistant who is also a deputy sheriff and who is also not a lawyer. Between them, they are responsible for most of the programme's instructions, although the staff lawyer delivers lectures on some topics. Guest lecturers with special knowledge are brought in occasionally to help with some subjects.[213]

The curriculum is imaginative. It includes lectures and practical sessions on these subjects: fitness, dress and deportment, escorts, report writing, civil law, prisoner documents and jail procedure, weapons policy, radio communications, the *Jury Act*, skip tracing, criminal law, witness administration and court security, library services, the *Coroners Act*, warrants of committal, firearms training, driver training, baton training,[214] the office of Crown Counsel, assistance to the Superintendent of Motor Vehicles, native court workers, vehicle searches, first aid, fire services, telephone communications, the Provincial Court, and crisis intervention and stress management. All this is done in seven weeks; until the Autumn of 1980 it was six.

The time available is not well used.[215] The level of instruction is below "post-secondary" standards; there are no text books; the deputies do not learn case law, and they are not usually required to read anything outside class beyond the *Sheriff Services Operating Manual*, a looseleaf compendium of practical and legal information published and kept more-or-less up to date[216] by the court services division.

Moreover, many subjects receive only cursory treatment. For example, in the Autumn of 1980, 40 minutes were allocated to a lecture on arresting ships but only 10 minutes were actually used. Later, a 30 minute videotape lecture by a lawyer was added. In 1980, only 35 of 245 total course hours were devoted to "civil law."[217] That compared with 29 hours for fitness, 18 hours each for firearms and driver training, and 12 hours each for criminal law and first aid. The civil law tutorials comprised instruction on the judicial system, trials, appeals, torts, contracts, property rights, the difference between criminal and civil law, civil court jurisdiction, originating process, pleadings, service of civil documents (including the proper methods of service), the preparation of affidavits, enforcement of judgments (including the writ of seizure and sale, certificates of "judgment," encumbrance searches, methods of interviewing debtors, *nulla bona* endorsements, instalment payments, seizures, execution against land, conduct of a sheriff's sale, sale of shares, the *Creditor Assistance Act*, and writs of possession), the *Recovery of Goods Act*, the *Repairers Lien Act* and the *Woodworker Lien Act*.

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[210] For budget reasons, there was no session during Autumn 1982.

[211] Training for deputy sheriffs began at the British Columbia Institute of Technology in 1974 on the initiative of the provincial Justice Development Commission (now defunct): *see* P.S. Millar and C. Baar, *Judicial Administration in Canada* (1981) at 352-3. The program was moved to the Justice Institute in 1979.

[212] *See* pamphlet entitled *Justice Institute of British Columbia*, available from the Institute and from offices of the Ministry of Attorney General.

[213] For example, during the course in the Autumn of 1980, there were lectures by a regional manager, a librarian, police officers, a justice of the peace, a member of the staff of the Crown counsel office, a Provincial Court Judge, and an employee of the telephone company.

[214] It is interesting to note that the deputies are now taught how to use batons, because a "wand" as a symbol of the sheriff's authority "is of very ancient origin." *See* Derriman, *supra*, note 30 at 112-13, where use of wands is traced to 1321.

[215] One deputy who had studied one year at university reported that there was too much repetition and that what was covered could easily have been covered in half the time allotted. There is no doubt that that is true.

[216] Some deputies have regularly complained that they are not kept informed of recent developments in the law as it affects their duties.

[217] *See* Curriculum for Deputy Sheriff Basic Training Program, 20 October–12 December 1980.

Deputy sheriffs must take examinations in order to "graduate" from the programme. They are required to score at least 50 per cent on each examination they sit and must obtain an average of 60 per cent overall. There are also practical examinations in "weapons," for which a score of 70 per cent must be achieved, and in "vehicle search," where each deputy must find at least three quarters of the articles hidden in a sedan.[218] It is not surprising, bearing in mind the quality of instruction and what is expected of the students by way of preparation, that the written examinations, which are set by the instructor, tend to be simplistic.[219] These are typical examples of questions from the civil law test administered in the Spring of 1980:

6. After you have received a Supreme Court Writ of Seizure and Sale, does the Writ expire and if so when?
8. When you are about to execute a Writ of Seizure and Sale and you ascertain that the debtor has transferred the vehicle to some other person, prior to your attempt to seize, what would you do?
10. When you seize a motor vehicle,
    (a) What do you do with the keys?
    (b) What do you do with the registration?
    (c) What do you do with the plates?
21. List eight (8) types of persons who are disqualified from serving as a juror.
24. What is a Style of Cause? (Explain)
29. Under a Replevin Order how and when may a sheriff if necessary, break and open a house or building?
34. On any County or Supreme Court Document, how is substituted service effected?

The deputy sheriffs are not left entirely on their own when they leave the "basic training" programme. They have access to the *Manual*, and some effort is being made to give continuing education, at least for those deputies who tend to specialise in the work they do.[220] There was one course on civil executions during the spring of 1980 and another in January 1981. Among the instructors were two lawyers. Despite these measures, education beyond the "basic training" course really comes from experience on the job. Execution work is an example. As a matter of policy, at least in the larger offices, two deputy sheriffs work together. One of them is a more senior person who may but does not necessarily have several years experience in levying execution. In fact, his experience may be limited to a few months. The other is a junior deputy who is there to gain practical experience. It is commendable, of course, as a general rule to encourage junior people to learn from their seniors, but the danger that bad habits will be learned and wrong practices perpetuated cannot be ignored.[221]

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[218] *See* Court Services Circular 1/80, 12 May 1980, at 1-2 and *Sheriff Services Operating Manual* at page 2-29.

[219] In France, the regional chambers of the professional organization of huissiers set examinations twice each year. "The examination is carried out by a team drawn from huissiers, judges and university law professors:" *see* M. F. Gremont, "Court Enforcement Officers" (1979) S.L.T. (News) 272, at 273. At 274, Gremont says that the "national chamber . . . issues a diploma on procedural law which is officially recognized by the universities." In a letter, M. Gremont described the way in which huissiers in France are examined and mentioned that only 35% of the candidates who sit the examinations are graduated.

[220] In addition there are courses for aspiring supervisors in sheriff services: *see*, *e.g.*, 3 *Forum* (Issue 4) (June 1982) at 14.

It is undoubtedly necessary to give all deputy sheriffs some training in connection with all the work for which sheriff services has undertaken responsibility, if only because it is almost inevitable, even if it is not necessarily desirable, that from time to time deputies will be shifted from one set of duties to another. And it is obviously neither realistic to expect nor necessary that deputy sheriffs or sheriff's officers be lawyers. Nevertheless, not enough is being done today to give the people the knowledge they need to do properly the jobs they are asked to do. Indeed, they are not given enough information to enable them even to spot many potential problems. The problem of lack of knowledge is made more acute because the deputy sheriffs work as a part of a bureaucracy which does not supply direct supervision by lawyers. This is not a small point when it is remembered that deputies have powers of the most intrusive kind. They may make arrests, they can, in some circumstances, break into private dwelling houses and they are able to seize and carry away personal property. They should know what they are doing. There is a lesson to be learned from England, where, since 1413 at least, lawyers have been available to supervise the sheriff's work. In British Columbia, a precedent of sorts for supervising lawyers exists. It is found in the necessary and happy relationship between the office of Crown Counsel and the police.

If the suggestion to appoint or retain supervising lawyers is not adopted, the "basic training" programme should be lengthened and strengthened.[222] More attention should be paid toward instructing the deputies about the powers, responsibilities and implications of their work. The deputies should be encouraged to think more seriously than they are now about their duties and the ways in which they can be discharged. Attendance at special continuing education courses on particular subjects (such as "Valuing Goods" or "Arrest" or "Empanelling Juries") should be required from time to time of all deputies, or at the least of all those who are, in practice, working as specialists. If the proposal for district lawyers is accepted, then the lawyers should be consulted about the curriculum for the "basic training" programme and they should be used as instructors whenever their special knowledge is needed. They should also plan and teach the continuing education courses.

In any event, close attention should be paid to the way in which court enforcement officers are organized and trained in continental Europe. For that reason, Douglas Martin's admirable *Study of the Profession of Hussiers de Justice*[223] is a work that cannot be ignored.

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[221] The danger is real. In "The Day the Deputy Came Up Empty," *The Vancouver Sun* 23 June 1982 at B1, the deputy "in charge" of executions in Vancouver was quoted as having said: "You give a lot of people the benefit of the doubt, hoping things will work out." If the deputy was quoted accurately, then it is likely that his approach (which at best is questionable) will be adopted by those who learn from him. In New Brunswick, newly recruited deputy sheriffs do not work on civil executions until they have been with the office at least six months. In the State of Victoria, "[c]are is taken to ensure that appointments, particularly that of immediate Deputy to the Sheriff, are made in sufficient time to ensure adequate experience is maintained in the Office" [letter from P. Duncan, Deputy Sheriff, Sheriff's Office, Melbourne, Victoria]. In Scotland, ". . . most new sheriff officers receive their initial training while working with an experienced officer of the court. Some officers become 'apprentices' on leaving school, and are sheriff officers for the whole of their working lives; other officers are recruited much later in life and have held other jobs." *See* Scottish Law Commission, *Fifth Memorandum on Diligence* at 24, para. 3.4.; and *see* J.R. Philip, "The Sheriff Court," in *A Guide to the Scottish Legal System* (no date provided). In West Germany, aspirant gerichtsvollziehers (bailiffs) ". . . spend one and a half years under training in the court, six months of training school and then are required to pass an examination to become 'assistants of justice'." It is from the body of "assistants" that the gerichtsvollzierhers are recruited: *see* Martin, *Study of the Profession of Huissiers de Justice*, *supra*, note 61, Part B at para. 15.3. In The Netherlands, appointment as a gerechtdeur waarder (doorkeeper of justice) must await successful completion of examinations which follow a three year course comprised of one year of lectures one day a week and two years practical training: *see* Martin, Part B at para. 16.3. Only 30% of the candidates pass the examinations: para. 16.4. Training in Belgium is similar: para. 16.17.

[222] The course is as short as it is now because no one can be spared to teach and because the deputies who might profit from it are needed to work in the local offices.

[223] *Supra*, note 61.

G. Labour Relations

There is no evidence that bailiffs and sheriff's officers in England ever organized against those who hired them to press claims for more money or for better working conditions, They probably did, however informally, and just as probably got nowhere. It seems safe to say that there were always many people ready to take their places. Now, in England, there is a Sheriffs' Officers' Association.[224] Higher up the ladder there has also been some organization, although in terms of the calendar of sheriff's history, these developments have been modern. Thus, an association of under-sheriffs was formed in 1887 and it still carries on its business from London.[225] There has been a Shrievalty Association for the sheriffs themselves since 1971.[226] In Scotland, there is both an Association of Sheriffs Principal and a Society of Messengers-at-Arms and Sheriff Officers.[227] All these organizations are professional associations, not trade unions.

In British Columbia today, a labour union represents the interests of many of the employees of sherif services. That union is the British Columbia Government Employees' Union,[228] which has been certified by the Labour Relations Board of the Province as bargaining agent for all employees except "a sheriff or senior deputy sheriff."[229] It has as one of its objects: "To act as the representative of the employees of the Government of British Columbia for the purpose of discussing with the Government the general welfare of the employees and the conditions of their employment."[230]

There is a Master Agreement[231] made between the union and the government of the Province represented by the Government Employee Relations Bureau. There is also a Component Agreement,[232] made between the same parties, but "respecting employees of the Social, Educational and Health Services Component," of which, for some reason, the deputy sheriffs are a part.[233] The Master Agreement is "the principal agreement under which all negotiable items are bargained."[234] The Component Agreement sets out "the terms and conditions applicable to employees included"[235] in the Component. Nothing in either agreement[236] derogates from the acknowledged right of the employer to manage and direct the employees in the bargaining unit, except as the Master Agreement "otherwise specifies."[237] The statutes which sanction all this are the *Public Service Labour Relations Act*[238] and the *Labour Code*.[239] The *Act* has the upper hand.[240]

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[224] It made submissions to the Payne Committee: *see Report of the [Payne] Committee on the Enforcement of Judgment Debts* Cmnd. 3909 (1969), at para. 665.

[225] *See* the Minutes of Evidence in the *Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 33 at 31. In 1980, the under-sheriff of Greater London was Honourary Secretary of the Association.

[226] Gladwin, *supra*, note 161 at 382: ". . . fifty past and present sheriffs gathered together in London on 14 April, 1971 to form a High Shrievalty Association. The meeting was an historic occasion, for it was the first time that the sheriffs had met as a body since 1333 when they had banded together to present a petition to parliament urging that the Statute of Northampton . . . should be strictly observed." *See also* Appendix II to the *Guide to the Office of High Sheriff* (1979), prepared by the Council of the Shrievalty Association.

[227] *See* Scottish Law Commission, *Fifth Memorandum on Diligence*, *supra*, note 191 at 26, para. 3.5. The Society has even adopted a "Code of Professional Ethics," (at 54, footnote 1) and is a member of the "Union International des Huissiers de Justice et Officiaires Judiciaires."

[228] *See* Article 1 of the *Constitution and Bylaws* of the B.C. Government Employees' Union (1979) at 5.

[229] *Public Service Labour Relations Act*, R.S.B.C. 1979, c. 346, s. 1 (1).

[230] *Constitution and Bylaws*, *supra*, note 228, Article 3 (c), at 5.

[231] It expires at midnight on 31 October 1983. *See* Master Agreement, Article 33.01 at 104.

[232] Made 7 November 1979. It expired at midnight on 31 July 1982 but no new component agreement had been made by August 1983. *See* Component Agreement, Article 16.01 at 27.

[233] The component is defined in Appendix 3 to the Master Agreement at 107 (c), as consisting ". . . of those classifications involved in sociological, cultural, education, research, health care delivery, and the direct technical support functions thereto."

[234] *See* Master Agreement, Article 1.05 (a) at 5.

[235] *See* Component Agreement, Article 1—Preamble at 6.

[236] The Component Agreement is subject to the provisions of the Master Agreement: *see* Master Agreement, Article 1.05 (b) at 6.

[237] *See* Master Agreement, Article 6 at 15.

Although "a sheriff and senior deputy" are persons excluded from the class of employees for whom the union acts as bargaining agent, this fact is of limited significance. For all practical purposes there are no "sheriffs" or "senior" deputies anymore. The latter title matched a pay classification which is no longer used. In practice today, none of the director of sheriff services, his deputy, or the regional, district and local managers are union members. All the deputy sheriffs 1 are union members, as are most of the deputy sheriffs 2 and 3, except those who act as section heads or supervisors. Sheriff's officers are "auxiliary employees."[241] They are union members, but fall within the Administrative Services component.[242]

Some terms of the Master and Component Agreements deserve special notice here. Others will be discussed in connection with topics to be addressed later in this paper.

1. OVERTIME

First there is the question of overtime. All union employees in sheriff services work 35 hours a week.[243] The usual hours of work are from 8:30 a.m. to 4:30 p.m., with lunch, Monday to Friday. For some responsibilities, notably executions, other shifts — *e.g.*, 12 noon to 8:00 p.m. — are worked, but usually only one day a week. The employees can only be required to work longer hours in "emergency situations."[244] No definition of cases of emergency has been worked out by the government and the union, largely because it is thought that no suitable definition could be drafted. Obviously, it could be difficult. For example, is it an "emergency" when a judge directs that the court's process be executed immediately? That "emergency" is not something over which either the employer or the union have control.

In practice, the deputy sheriffs frequently work overtime and are happy to do so. Sometimes they are given the opportunity because there are not enough employees on the job during the ordinary hours of work to do what must be done.[245] This paper is not an efficiency study, and for that reason there will be no discussion here about apparent shortages of staff. But there is, by the very nature of things in sheriff services, work which does not conveniently fall within seven hour shifts. Commonly that is the work of executions, escorts and "jury management." Thus, overtime is sometimes worked.[246] And when it is, the Master Agreement applies:[247]

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[238] R.S.B.C. 1979, c. 346.

[239] R.S.B.C. 1979, c. 212.

[240] *Public Service Labour Relations Act*, R.S.B.C. 1979, c. 346, s. 26.

[241] *See* Master Agreement, Definitions, at 1-2.

[242] It is defined in Appendix 3 to the Master Agreement, at 107 (k), as consisting ". . . of those classifications which act in direct support to administrative, social, and legal programs by providing such services as clerical, stenographic, business-machine operation, etc., or which are of an administrative or supervisory nature which may include technical support and auditing, taxation, systems, or regulatory/enforcement in a commercial environment." It includes court clerks.

[243] *See* Master Agreement, Article 14.01 (a) at 33. *See also* Component Agreement, Article 3.01 at 6-7. Things were different in the nineteenth century. *See, e.g., Albrecht* v. *Long*, (1878) 25 Minn. 163, where a writ was delivered to the sheriff "in person, at 2 o'clock a.m." and where his deputy executed another writ against the same debtor the same morning at "half-past six."

[244] *See* Master Agreement, Article 16.09 at 44.

[245] The most frequent complaint made about sheriff services is that there are not enough people to do the work. *See, e.g.*, the complaint made by the Provincial Council of the British Columbia Branch of the Canadian Bar Association, mentioned to in Chapter I, note 13. Judges at all levels in the Province have mentioned staff shortages, particularly insofar as the provision of security in the courts is concerned. However, it is not just a question of numbers. It is as much a matter of training and of the need for specialization and proper supervision.

[246] For example, in one criminal case, as the presiding judge reported, (*see* (1980) 1 Forum (Issue 4) at 13):

> . . . the jury commenced its deliberations at approximately 5:00 p.m. on Wednesday 2nd April, and was not able to reach its verdict until approximately 4:30 p.m. on Sunday 6th April. This necessitated the attendance and services of staff for long hours each day, including three days of the normal Easter holiday weekend.

[247] At 41-2.

> (a) An employee who is required to work overtime shall be entitled to overtime compensation when:
> (1) the overtime worked is authorized in advance by the Employer; and
> (2) the employee does not control the duration of the overtime worked.
>
> (b) Notwithstanding the foregoing, the Employer and the Union recognize that the nature of the work carried out by persons in some classifications is such that it may not be possible for the employee to obtain prior authorization for the necessary overtime work. In such cases the employee shall use his/her discretion in working the overtime and the Employer shall be considered to have authorized the overtime in advance. However, the Employer reserves the right, subject to the grievance procedure, to determine the legitimacy of the overtime claimed. In order to facilitate a fair and reasonable administration of the Clause, the Ministry will draw up regulations defining the circumstances under which an employee may undertake overtime work without prior authorization. Copies of these regulations will be supplied to the Ministry Joint Committee.

The Ministry, as far as sheriff services is concerned, is the Ministry of Attorney General.[248] No regulations have been drawn up by that Ministry to help employees to know when they can work overtime without first being authorized to do so. It seems, perhaps surprisingly, that someone is always available to give the authorization.

2. DISCIPLINE

Second, there is the question of discipline. Here there is clear evidence that the courts are a forgotten party in the process by which public servants have assumed the job of sheriff. Section 2 (b) of Article 4 of the *Constitution and Bylaws*[249] of the union gives the Provincial Executive of the union "the right[250] to suspend [or] terminate . . . the membership of any member of the union for cause," and under section 3 (a) of Article 6[251] the same body has " . . . the authority to assess a penalty upon any member or groups of members for cause detrimental to the Union or for violation of the constitution, policies or by-laws of the union."[252] The penalty must be "in keeping with the nature of the offence up to and including the suspension of membership."[253] One "cause" would undoubtedly include crossing a picket line in violation of a union injunction not to do so. For that reason, these constitutional provisions must be read with a provision of the Master Agreement which states:

> All employees covered by this Agreement shall have the right to refuse to cross a picket line arising out of a dispute as defined in the *Labour Code of British Columbia*.[254] Any employee failing to report for duty shall be considered to be absent without pay. Failure to cross a picket line encountered in carrying out the Employer's business shall not be considered a violation of this Agreement nor shall it be grounds for disciplinary action.

It follows that the government, as employer, can do nothing to require any of its employees in sheriff services — when discharging sheriff duties — to cross a picket line. For that reason, it is doubtful whether the government could discipline those deputy sheriffs who refused, for example, to cross a picket line to go to their work arranging the attendance for trial of Crown witnesses in criminal cases, or those deputies who refused to cross a picket line to recover possession of a driver's licence or licence plates from a person whose licence had been suspended.

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[248] *See* Master Agreement, Definitions at 1 and Appendix 1 at 106.

[249] *Supra*, note 228 at 7.

[250] But, curiously, not the power.

[251] *Supra*, note 228 at 23.

[252] By s. 11 of Article 5 of the *Constitution and Bylaws*, *ibid*. at 22, each component is permitted to operate under its own bylaws, but matters of discipline rest with the Provincial Executive of the union.

[253] *Ibid*. at 23.

[254] *Labour Code*, R.S.B.C. 1979, c. 212; s. 1(1) provides that " 'dispute' means a difference or apprehended difference between an employer or group of employers, and one or more of his or their employees or a trade union, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done."

Most of what sheriff services now usefully does is not the business of the government; it is the business of the courts. The courts, for instance, order the sheriff to seize things from lawyers,[255] to arrest alleged contemnors[256] and can require the sheriff to execute its process. By common law[257] and statute,[258] the courts have powers to cite for contempt where their orders are not complied with. To some deputies, the consequences of the exercise of the contempt power might be at least as serious as suspension from union membership. It is not a small point: in 1892 the High Sheriff of Hampshire was fined 500 guineas for failing to attend the presiding Judge at the Winchester Winter Assizes.[259]

This issue is not a question solely for the negotiating table when the union and the government next get together. It is a matter — until there is legislation to change it — for each individual employee of sheriff services and the judge whose direction he is asked to carry out. Some deputy sheriffs in the Province are not bothered by having to cross a picket line to execute court orders; others are, and if they find that they would have to do so, they would first talk to their union representative. In practice, the union will do what it can to persuade picketing unions to allow deputies to cross the lines unimpeded. But there is no guarantee that the lines will be parted. And it certainly seems unlikely that they would be, for instance, if the picketers were court clerks — fellow members, with the deputies, of the government employees' union. Thus, when in August 1982, the government employees' union struck for one day, no union deputy sheriffs crossed the picket lines which formed at all the entrances to the Law Courts building in Vancouver. That building houses the Court of Appeal, the Supreme Court of British Columbia and the County Court of Vancouver. As a result, two "management" deputies who are excluded from union membership were responsible for the security of the building and for all executions. Because of the security problem, accused persons in most criminal cases set for hearing that day were remanded at the jails the night before.

3. STRIKES

Third, there is the issue of strikes. When the union employees of sheriff services strike, as they have a right to do in proper circumstances under the *Labour Code*,[260] the requirements of the courts must be considered. The right to strike is a right between sheriff and employer and it need not necessarily be recognized by the judges, who may see an overriding necessity to have the courts' process executed, if not in every case — which would be unrealistic — but in some cases of urgency. Obviously much will be done by the judges and by those people in sheriff services who are not union members to keep the courts working in the event of a strike by deputy sheriffs. That is demonstrated by the experience of August 1982. But while it is politically undesirable for the judges to compel the discharge of responsibilities, it is not inconceivable that in some special cases the threat of fine or committal for contempt might be the only avenue open to ensure that justice as between innocent litigants will be done.

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[255] *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 69 (2).

[256] *See*, *e.g.*, Rule 56 (5) of the Rules of Court.

[257] *See*, *e.g.*, *Morris* v. *Crown Office* [1970] 2 W.L.R. 792 (C.A.).

[258] *See*, *e.g.*, *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 2 (3) and *County Court Act*, R.S.B.C. 1979, c. 72, s. 86.

[259] The sheriff had gone to Africa for some sun: *see Oswald's Contempt of Court* (3rd ed., 1911) at 71. *And see generally In re the Sheriff of Surrey* (1860) 2 F. & F. 236, 175 E.R. 1039.

[260] R.S.B.C. 1979, c. 212, s. 80.

This point is not without its real example. In *Her Majesty's Attorney General for Newfoundland* v. *Newfoundland Association of Public Employees,*[261] Noel J. granted a permanent injunction which had the effect of ensuring that officers of the court, including sub-sheriffs, deputy sheriffs and sheriff's officers, could perform their duties notwithstanding attempts by the defendant Association to discipline them for discharging their responsibilities. At page 2 of his decision, Mr. Justice Noel said:

> This court has ample powers to ensure that its officers perform the duties that are required of them and to protect them in the performance of such duty. These powers are not for the purpose of vindicating the dignity of this court or of the person of the officer, but to prevent undue interference with the administration of justice.
>
> The officers of this court are its executive arm.
>
> No person may directly or indirectly by any act, omission or stategem whatsoever induce or attempt to induce any officer of this court to depart from his duty nor can any officer of this court for any reason whatsoever agree to do so. It is criminal contempt of this court to contravene that law.

And at page 3:

> This court is the supreme court of judicature for this province. It can only function through its officers, and for that reason an intention to disable this court will not be implied from any legislation of general application. If the legislature intends to disable this court it will do so by a clearly stated intention in legislation enacted for that purpose.
>
> I hope that the officers of the court who are present will realize that they have a solemn duty which they cannot escape by any act or agreement on their own part. Just as the judges of this court are judges for 24 hours a day, every day of the year, so the officers of this court are officers 24 hours a day, every day of the year. They cannot escape that duty until they are relieved by the appropriate authority.

Many deputies in this Province do not seem to understand to whom they owe ultimate fealty. This problem — with specific reference to registrars and clerks — is discussed with some excellent examples by Chief Justice Deschenes in his lengthy report on independent judicial administration.[262]

The lengths to which the union or some employees may go in insisting (in the face of the interests of the efficient administration of justice) on the rights for which they have bargained is illustrated by the case of *Regina* v. *Brass*.[263] There, a jury panel had been returned by sheriff services with the assistance of a clerk-typist in the employ of the service. As it happened, she was the wife of Crown Counsel and that lawyer was to prosecute the case for which the jury panel had been returned. Mr. Justice Locke gave effect to a challenge of the array on the ground justice must be seen to be done. What is not evident from the reasons for judgment but which is disclosed by Chief Justice Deschenes in his report[264] is that:

> . . . the sheriff himself had protested against employing, in his office, the wife of a crown prosecutor; the employee, however, had filed a labour-union grievance and had obtained a ruling ordering the sheriff to employ her.

Obviously something must be done to ensure that there can be no repetition of such a happening.

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[261] Unreported decision of the Trial Division of the Supreme Court of Newfoundland, No. 1331, 10 January 1979.

[262] *Supra*, note 26 at 22.

[263] [1981] 4 W.W.R. 657.

[264] *Supra*, note 26 at 81.

4. THE SOLUTION

In the federal Courts in America, the judges exercise "full authority" over their staffs, who " . . . do not belong to a union but traditionally enjoy conditions comparable to those obtaining in the civil service."[265] So long as their counterparts in British Columbia are union members, attention must be paid to the way in which their collective agreement is negotiated. As it is, the courts take no part in the process of negotiation and if the opinion of Chief Justice Deschenes is to be respected, they should take no part in the future.[266] His Lordship's opinion is a sound one. Judges cannot "risk the blame for labour disputes and work stoppages."[267] Better that officers of the courts should be given, by legislation, the advantages — working conditions, salaries, benefits, etc. — which other members of the public service enjoy, but that they should not, by statute, have the right to strike. Such a legislative scheme would ensure that the adminstration of justice is not impeded but would guarantee officers of the court bargained for rights. As Chief Justice Deschenes points out, "improved communication channels" would ensure that the judges could:[268]

> . . . impress treasury boards with the special needs of the judicial system, so that a collective agreement concluded in good faith would not, through ignorance, include provisions imcompatible with the harmonious operation of the courts.

If, as it is suggested in Chapter IX, a return is made to a system of entrepreneurial sheriffs, then the problem of labour relations will become a problem for each individual sheriff. Attention should be paid to the question of whether their unionized employees (if the right to bargain collectively is won) should be brought within the provisions of the *Essential Service Disputes Act*.[269] The question would only arise if it were acknowledged that this group of employees had no one bargaining for them. But would it be unfair simply to tie their working conditions, salaries, benefits, etc. to those of the public service? Why not?

H. Seals and Oaths

1. THE SEAL

This paper would not be concerned with the subject of a seal were it not that two provincial statutes direct the sheriff to use one. Section 98 (1) of the *Court Order Enforcement Act*[270] requires the sheriff on a sale of land under the *Act* to execute a conveyance "under his hand and seal." Section 760 of the *Municipal Act*[271] requires the sheriff on an execution against a municipality to issue a direction "under his hand and seal of office" to the municipal tax collector, calling on that official to satisfy the writ.

According to Morris,[272] the sheriff in England probably had a seal as early as the time of Henry II (1154–1189). In this Province, a seal was mentioned in the *Order in Council* of 1856.[273] For a long time, the *Sheriffs Act* authorized one,[274] though it no longer does. Despite the lack of legislative authority, there is a kind of seal in use today. Some local offices "authenticate" their notices of seizure by placing a large red wafer on them. The wafer has a serrated edge and raised letters reading "Office of Sheriff. County of . . . ." These words are dated and misleading. While the wafer undoubtedly lends more weight to these notices, the question remains of whether it would render legal the conveyance and the direction to which reference has been made.

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[265] *Ibid*. at 49.

[266] *Ibid*. at 95 and at 165-66.

[267] *Ibid*. at 95.

[268] *Ibid*. at 95 and at 147.

[269] R.S.B.C. 1979, c. 113.

[270] R.S.B.C. 1979, c. 75.

[271] R.S.B.C. 1979, c. 290.

[272] *See* Morris, *supra*, note 15 at 115.

[273] *Supra*, note 64.

[274] Even then, it seems, or so at least one of the old "fees" sheriffs has said, sheriffs often did not have one made up.

(a) *Under His Hand*

What is meant by the phrase "under his hand?" It seems clear, in England at least, that a person directed to act "under his hand" may sign "by his duly authorized agent." Thus, a "personal signature" is not required because "There might be reasons which made it impossible for a person to sign, or even to make his mark."[275] There is a contrary authority in Australia. Where it was said[276] that " . . . when a document is required by statute to be under a man's hand or signed by him what is ordinarily meant is that he must personally sign it, with his name or his mark, by a pen or by a stamp . . ."

In British Columbia, this conflict in authorities may make little difference because the *Interpretation Act*[277] gives the word "sheriff" a wide meaning, thereby opening up the class of potential signatories. In any event, the English authority seems preferable. It makes sense to allow someone other than the designated official to sign, as long as he has the official's authority to do so, particularly in a Province as large as British Columbia — where it is not possible for everyone to be everywhere all the time. For that reason alone, the Australian conclusion is surprising. It is an impractical approach in a large jurisdiction with a small population. If it is thought in particular cases that an agent should not be able to sign, then legislation can provide for those events.

(b) *And Seal*

> Affixing a seal may now seem to be a useless formality, though at one time it gave pause for reflection and denoted an act of unusual gravity. The authorities are clear that where a statute requires that an instrument shall bear a seal it is invalid without one."[278]

The absence of a seal when required could have disastrous consequences. That was how the sheriff found himself in trouble in *Reum* v. *Rutherford*:[279] the registrar of the Land Titles Office had, for want of the required seal, returned to the sheriff a copy of a renewed execution. When the deficiency was made right and the document filed, it was too late.

How serious is the omission in the *Sheriff Act* of a provision designating a seal as being the seal of the sheriff? As far as the *Court Order Enforcement Act* is concerned, it seems to make no difference. The *Municipal Act* is another matter.

A seal need not actually be a seal. The requirement that the sheriff "seal" a conveyance can be satisfied with " . . . wax, or a wafer, or a rubber stamp or any other impression put on as a seal."[280] Even the wax, the wafer and the stamp may not be necessary.[281] The need for an impression is arguable.[282] Ribbon may be enough.[283] It is a question of fact:[284] was *something* done with the intention of sealing?[285] The question becomes: is there some "indication"[286] of a "seal?" In British Columbia a wafer is probably sufficient for the purposes of the *Court Order Enforcement Act*.

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[275] *In re Dipford Parish Lands and Charitable Trusts Acts, 1853 to 1925*, [1934] 1 Ch. 151 at 161.

[276] In *Electronic Rentals Pty. Ltd.* v. *Anderson*, (1970-71) 124 C.L.R. 27, *per* Windeyer J. at 42.

[277] R.S.B.C. 1979, c. 206, s. 23 (2).

[278] *McManamny* v. *Ross*, (1897) 23 V.L.R. 88 (S.C.) *per* A'Beckett J. at 93. Sealing is still matter of considerable importance: *see, e.g.*, *Petro Canada Exploration Inc.* v. *Tormac Transport Ltd.*, (Unreported, B.C.S.C. Dawson Creek Registry, C91/82, 17 March 1983).

[279] *Supra*, note 115. Saskatchewan still requires the sheriff to have a seal of office: *see The Court Officials Act*, R.S.S. 1978, c. C-43, s. 24.

[280] *Electronic Rentals Pty. Ltd.* v. *Anderson*, *supra*, note 276 at 42.

Having said that, it is necessary now to say that a wafer or wax or a stamp or an impression is probably not enough to satisfy the requirement of the *Municipal Act* that the sheriff act with his "seal *of office*." A seal of office is arguably something more than just a seal or even something more than "his" seal. It is a special kind of seal for which it seems there must be a statutory warrant. It is a matter of speculation whether the direction for which provision is made in section 790 would be valid if it was issued by the sheriff "under his hand and a wafer," for example. It may be that the tax collector to whom it was directed would be justified in ignoring it.[287]

There is no clear authority on what is to be done when a statute requires that something be done with something that does not exist.[288] The simple solutions of course are to give the sheriff a seal of office — which hardly seems necessary these days — or to change section 790. The change would seem to be the most sensible course. A direction under the sheriff's "hand and seal" should be more than enough to force the tax collector to act.

2. THE OATH

Every public servant in British Columbia must "take and subscribe" an "oath" on entering on the duties of his employment.[289] Thus, the director of sheriff services, the sheriffs, all the deputies and anyone else appointed under section 2 (1) of the *Sheriff Act*[290] must comply.

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[281] *See National Provincial Bank of England* v. *Jackson*, (1886) 33 Ch. D. 1 (C.A.) at 11, *per* Cotton L.J. and *Stromdale & Ball Ltd.* v. *Burden*, [1952] 1 Ch. 223 at 230, *per* Danckwerts J. A stamp is "equivalent to a seal:" *see Sprange* v. *Barnard*, (1789) 2 Bro. C.C. 585, 29 E.R. 320.

[282] Bovill C.J., in *In re Sandilands* (1871) L.R. 6 C.P. 411, at 413, did not think that an impression was necessary. Dankwerts J., in *Stromdale & Ball Ltd.* v. *Burden*, *supra*, note 281 at 230, seems to agree when he says that: "Meticulous persons . . . may still place their finger on the wax seal or wafer on the document," but that it is not necessary to do so. But Byles J., at 413, in *In re Sandilands* said that sealing "may be done with the end of a ruler or anything else." That suggests that an impression is needed. In *National Provincial Bank of England* v. *Jackson*, *supra*, note 281 at 11, Cotton L.J. agreed with Bovill C.J. "that neither wax nor wafer is necessary," but his agreement did not extend to cover the absence of an impression. At best he left the question open. Two marks in ink on a printed form "impressed by means of wooden blocks" and representing "an equestrian figure of St. Martin sharing his cloak with a beggar" were held to be sufficient in *The Queen* v. *The Inhabitants of St. Paul, Covent Garden*, (1845) 7 Q.B. 232, 115 E.R. 476. That case is some authority for the use of a "standard form" of deed. Section 7 of the *Supreme Court Act*, R.S.B.C. 1979, c. 397 seems to suggest that the legislators think that an impression is necessary and is enough.

[283] *In re Sandilands*, *supra*, note 282.

[284] *National Provincial Bank of England* v. *Jackson*, *supra*, note 281 at 11, *per* Cotton L.J.

[285] *In re Sandilands*, *supra*, note 282 at 413, *per* Montague Smith J.

[286] *Stromdale & Ball Ltd.* v. *Burden*, *supra*, note 281 at 230, *per* Danckwerts J.

[287] The direction may be "invalid" without the seal of office: *see McManamny* v. *Ross*, *supra*, note 278 at 93. If the direction is invalid for want of the seal, then presumably the sheriff could not succeed on an application under s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209 to compel the collector to perform the duties imposed on him by ss. 760 and 761 of the *Municipal Act*, R.S.B.C. 1979, c. 290.

[288] *In re The Court Bureau, Limited* [1891] W.N. 9 (Ch.) is equivocal. There, statutory rules required that a deponent in an affidavit of service swear that he had served a copy of a petition "duly sealed with the seal of Court." The Court had no seal. A petitioner applied for directions about how to swear the affidavit. Stirling J. avoided the real question by saying that the previous practice would do, apparently until a challenge to the validity of service was made.

[289] *Public Service Act*, R.S.B.C. 1979, c. 343, s. 42. There are in fact three "oaths," the Oath of Allegiance, the Oath of Office, and the Revenue Oath. The forms of the oaths are found in Schedule A to B.C. Reg.632/76. By section 29 of the *Interpretation Act*, R.S.B.C. 1979, c. 206, "oath" is defined to include "an affirmation" and "swear" to include "affirm." Apparently out of an abundance of caution, B.C. Reg. 632/76 also provides that ". . . an appointee who objects to swearing the oaths because of religious views may affirm or declare the oaths in the manner prescribed by the Public Service Commission." For what it is worth, the government must "grant the necessary time off" to employees for the purpose of swearing the oaths: *see* Component Agreement, *supra*, note 232 at 18-9.

[290] R.S.B.C. 1979, c. 386. An oath is nothing new for sheriffs in British Columbia. An oath was first required on Vancouver's Island in 1856: *see* the Order in Council of 4 April, 1856, *supra*, note 64. There was nothing in the *Sheriff's Act, 1860* for the mainland Colony. *The Sheriffs Act*, R.S.B.C. 1897, c. 172 required *both* an oath and a declaration (*see* ss. 4 and 26), and the requirement was carried through until 1976.

There is undoubted historical justification for requiring the sheriff to swear an oath of office: it was "customary" in 1252.[291] Under-sheriffs were first required to lay bare their consciences in a statute[292] of 1585. In 1626, the oath was the subject of challenge by Sir Edward Coke[293] after he had been "pricked" for Sheriff of Buckingham. The pricking was a manoeuvre by the King to keep Coke out of Parliament.[294] The present English "declaration"[295] had its origin as an oath in a statute[296] enacted in 1716. At that time of course, the oath still contained the imprecation of the vengeance of Heaven.[297] The declaration no longer does. The imprecation is found today in two of the three forms of oath to be sworn by the public servants of this Province.[298]

Why an oath? In earlier times, the subscription of an oath was a means by which abusive sheriffs were controlled. Thus, in the time of Henry III (1216–1272), each sheriff swore:[299]

> . . . to serve the king loyally; to do right to rich and poor alike and not to omit this for love, hatred, fear or covetousness; to take nothing by occasion of this jurisdiction either by himself or others, except only the meat and drink by custom brought to his table and that for one day at most; to have not more than five horses in the place where he lodged by reason of his office; to lodge with no one who had less than forty pounds value of land, nor in any religious house which had less than the value of a hundred marks yearly in land or rents; not to lodge with any of these more than once a year, or twice at most, and then only with their prayer and consent, not drawing this into a precedent; not to take presents of anything else worth more than twelve pence in case it be expedient to lodge there longer; not to have more bailiffs than were reasonably needed to maintain his office and these persons whose trustiness could be vouched; and finally to farm to no one the counties, hundreds, wapentakes and other bailiwicks of the realm.

And so the oath secured proper performance by the sheriff of the duties of the office. In fact, the absence of an oath was sometimes even said to be the reason for the failure to perform. For example, the Elizabethan statute of 1585 began this way:

> Forasmuch as grievous Complaints are many Times made of the Misdemeanor and evil Behaviour of Under-Sheriffs, who oftentimes having to them committed by the High Sheriff the Whole or Part of the exercising and executing of the Office of the High Sheriff, and not taking any corporal Oath as the High Sheriff doth, for the executing and discharging of the same Office, do therefore daily most injuriously, through Corruption and Affection, impanel jurors for the Queen's Majesty, and betwixt party and party, to the great Loss, Damage and Hindrance of divers her Majesty's loving Subjects of this Realm . . . .

There was no doubt a sincerely held belief, among some at least, that those who swore falsely before the Deity would suffer Divine retribution.[300] That was clear from Dalton, who railed against those under-sheriffs and officers who did not " . . . foresee the hazard which may come to themselves, by the breach of their oathes to God . . . ."[301] But sometimes the practice of requiring oaths was taken too far:[302]

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[291] *See* Morris, *supra*, note 15 at 176. *See also* T. Madox, 2 *The History and Antiquities of the Exchequer of the Kings of England*, (1769) at 147. Madox was less sure about the custom than was Morris: "Whether the Sheriffs of *England* in the most ancient Times took an Oath to the King upon entering into their Office, I cannot say with Certainty . . ."

[292] 27 Eliz. c. 12.

[293] *Sir Edward Coke's Case* (1626) Cro. Car. 26, 79 E.R. 628. *See also* C.D. Bowen, *The Lion and the Throne*, (1956) at 472.

[294] *See* Chapter IV for a discussion of the right of sheriffs and deputies to seek and hold elective office.

[295] *Sheriff's Act*, 50 & 51 Vict., c. 55, s. 7 (1) and The Second Schedule.

[296] 3 Geo. 1, c. 15.

[297] "So help me God." *See The King* v. *White* (1786) 1 Leach 430, 168 E.R. 317: ". . . an Oath is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth . . ."

[298] The words "So help me God" appear in the forms for the Oath of Allegiance and the Revenue Oath but for some reason they have been omitted from the Oath of Office.

[299] *See* Morris, *supra*, note 15 at 171.

[300] "So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministered to any unless the same be allowed by common law, or by some Act of Parliament, neither can any oath allowed by the common law, or by some Act of Parliament be altered but by Act of Parliament:" 3 Co. Inst. 165.

> During the seventeenth and eighteenth centuries the propensity to multiply promissory oaths of office was carried to absurd lengths. . . . Even a worsted weaver and a Kidderminster weaver were required to swear that they would faithfully discharge the duties of their office; and a form is given of an oath to be taken by an ale-taster: 'You do swear that you shall well and truly execute the office of ale-taster within this Leet. You shall see that all victuals, bread, and beer put to sale within this Leet be sweet and wholesome.'

What in some cases is now seen to be an absurdity was in its time considered to be a useful " . . . expedient, crude enough it is true, for constraining royal officials to keep the law."[303] And the sheriffs were important members of that class.

How much the oath continues to be an expedient today is questionable. Oaths in judicial proceedings are frequently attacked.[304] Most of the criticism might be reduced to an awkward but nonetheless apt aphorism attributed to Confucius: "Heaven doesn't hear an oath which is forced on one."[305] That of course is a matter of theology. But there does not seem in any event to be a secular penalty in British Columbia for breach of the public service oaths unless it is to be found in section 5 (1) of the *Offence Act*:[306]

> A person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment.

"Enactment" includes a regulation,[307] and the forms of oath the public servants take are contained in a regulation authorized by section 75 of the *Public Service Act*.[308] Is breach of an oath a contravention of the regulation in the way contemplated by the provision? And what about problems of proof? Could it ever be shown that someone did not act "to the utmost of [his or her] ability?"

It is best to leave those questions and to close this section by observing that it seems curious, assuming as the Legislature does that oaths are desirable, that no provision has been made for the subscription of oaths by those people who are appointed to act "as deputy sheriffs" under section 2 (2) of the *Sheriff Act*. Those people are not public servants. They are the people over whom it would be thought the government would most want to exercise control. The absence of the requirement for an oath from them runs contrary to a clear legislative decision to demand oaths from others who are employed or are called upon to act in a wide range of public activities. For example, appraisers hired for a specific purpose under section 70 of the *Court Order*

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[301] M. Dalton *Officium Vicecomitum or the Office and Authoritie of Sherifs* (1623), in The Epistle.

[302] 10 *Encyclopedia of the Laws of England* (2nd ed., 1908) at 104.

[303] McKechnie, *supra*, note 167 at 433. *See also* C.W. Kett, "Oaths" (1951-52) 25 Aust'l L.J. 681, 682: "The oaths now administered among civilized nations are chiefly intended for maintaining Governments and securing the performance of public business."

[304] *See*, for a recent example, T. Radevsky, "Is the Oath Out of Date?" (1980) 130 New L.J. 397. There it is said at 397-8, that the ". . . proposal for the abolition of the oath and its replacement by some secular promise to tell the truth is by no means original . . ." *See also* H. Silving, "The Oath: I" (1959) 68 Yale L.J. 1329, at 1389-90 and D.M. Walker, *The Oxford Companion to Law*, (1980) at 896.

[305] *See* M.H. Kingston, *China Men* (1980), at 92. *See also* H. Silving, "The Oath: I," *supra*, note 304 at 1380-1.

[306] R.S.B.C. 1979, c. 305.

[307] *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 1.

[308] R.S.B.C. 1979, c. 343.

Enforcement Act[309] must swear an oath, or affirm, that they will "faithfully perform the duties of the office without partiality, fear, favour or affection."[310]

The subject of oaths *qua* oaths is one which, perhaps, calls for a separate study. For that reason, no specific recommendation about oaths for the public is made here. It is enough to say, on the theory of the ale-taster, that more oaths are probably not required.

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[309] R.S.B.C. 1979, c. 75.

[310] There are many other statutory examples of oaths required from people who are not public servants. *See, e.g., Election Act*, R.S.B.C. 1979, c. 103, s. 72 ("deputy returning officers"); *Expropriation Act*, R.S.B.C. 1979, c. 117, s. 47 ("the jury"); *Inquiry Act*, R.S.B.C. 1979, c. 198, ss. 2, 10 ("every commissioner"); *Jury Act*, R.S.B.C. 1979, c. 210, s. 16 (1) ("empanelled" jurors); *Municipal Act*, R.S.B.C. 1979, c. 290, ss. 257, 258 ("officers or permanent employees of a municipality"). Extra oaths are required of public servants by some statutes, *e.g., Fish Inspection Act*, R.S.B.C. 1979, c. 136, s. 3 ("inspectors, officers, clerks and other employees") and *Supreme Court Act*, R.S.B.C. 1979, c. 397, s. 52 ("official and deputy official reporters to the court").

CHAPTER IV THE SHERIFF'S SPECIAL CIVIL STATUS

A. Is the Office of Sheriff a Compulsory Office in British Columbia?

In England, anyone with land can be compelled to serve as sheriff. This compulsion has existed since at least the thirteenth century,[1] undoubtedly because the sheriff was a necessary royal officer. But as Morris says:[2] "[s]ome persons sought and obtained the king's grant of privilege that they should not be made sheriffs against their will." There is a long history of attempts to avoid the office,[3] but the courts have never been sympathetic to shirkers. The principle was stated this way in 1820:[4]

> His Majesty may . . . , on any occasion, employ, and compel his subjects to serve in such offices or functions as the public good and the nature of the constitution require. It is a general rule, that where a person is legally called upon to perform a public duty, he is liable to be punished if he refuse to perform it.

Curiously, the office of sheriff seems to be the last compulsory office under the Crown in England.[5]

It is necessary to ask whether anyone could be compelled in British Columbia to do the kinds of things reserved for sheriffs. To put the question is not to ask about judges compelling deputies to discharge responsibilities they may have as officers of the court. Rather, it is to ask whether the Crown here can compel a citizen to take on the work the sheriff does. In this Province, the Crown is synonymous with the government.[6] The notion that in this Province a person could be compelled to do anything by a government acting without specific statutory authority seems startling, but it is surely no less startling to the English, who continue to live with the rule. The question of whether the rule is in force in this Province is one of a number of recurrent questions about reception of English law which concern so many former British Colonies.[7]

Any consideration of reception in this Province begins with section 2 of the *Law and Equity Act*.[8] That section provides in part:

> . . . the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in the Province; but those laws shall be held to be modified and altered by all legislation having the force of law in the province or in any former Colony comprised within its geographical limits.

It is arguable that local circumstances in British Columbia make compulsory offices inapplicable. Here, the office of sheriff is a department of the public service, and the public service serves the government. But it is impossible to ignore the legal recognition accorded the Crown in the Province.[9] There is nothing anywhere to suggest that British Columbians take the Crown for some purposes only and not for others, and there is no legislation which modifies or alters the English "law" about compulsory service.[10] Thus, it is not wrong to say that the Crown in this Province may have the power to require citizens to discharge the responsibilities of the office of sheriff.[11] Obviously it is a power which the government would be reluctant to exercise even if it realized it had it to exercise. Still, there is probably no satisfactory justification for a compulsory power in these times and for that reason it would be desirable — so that there is no question — to amend the *Sheriff Act*[12] to provide that no person can be compelled to serve the office of sheriff in any capacity.

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[1] W.A. Morris, *The Medieval English Sheriff to 1300* (1927) at 178.

[2] *Ibid.*

[3] *See, e.g., Pelham's Case*, (1583) Sav. 43, 123 E.R. 1002; *Rex & Regina* v. *Larwood*, (1694) 1 Ld. Raym. 29, 91 E.R. 916; *The King* v. *Clarke*, (1787) 1 T.R. 679, 99 E.R. 1317; *Reg. (Kaye)* v. *Parker-Hutchinson*, (1893) 32 L.R. Ir. 142 (Q.B.). A "growing reluctance to serve" was noticed in 1883: *see* the *Report from the Select Committee of the House of Lords on High Sheriffs* Cmd. 257 (1888) at IV. The Minutes of Evidence taken before the Committee reveal that of 998 persons nominated for sheriff during a period of 13 years, 342 claimed exemption: *see* the evidence of Charles Lennox Peel at 5.

[4] J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 18-9.

[5] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (19th ed., 1976) at 48-9. In South Australia, the sheriff cannot resign his appointment without the approval of the Governor.

[6] *See* Law Reform Commission of British Columbia, *Report on Civil Rights (Project No. 3), Part I, Legal Position of the Crown* (L.R.C. 9, 1972) at 9 and *Report on The Crown as Creditor: Priorities and Privileges* (L.R.C. 57, 1982) at 3.

[7] The subject of reception has occupied the Law Reform Commission for some time. Research is continuing.

[8] R.S.B.C. 1979, c. 224.

[9] *Ibid.* note 6 at 9 and 3, respectively.

B. The "Price" of the Office

Enquiries of deputy sheriffs reveal that many of those employed by sheriff services do not realize that they may have given up rights which they would probably enjoy if they worked elsewhere. Limitation of the civil rights of sheriffs is not new. In 1878, for instance, legislation was enacted which prohibited a sheriff from placing his name on a register of voters unless he had first resigned his office.[13] Sheriffs thus joined judges of the superior courts, stipendiary magistrates, constables, peace officers and returning officers as persons not entitled to vote at elections of members for the provincial legislature.[14]

Restriction of sheriffs' civil liberties is not peculiar to British Columbia. In England, there have been limitations of one kind or another since the middle ages, and there are limitations even today.[15] For this reason, limitations in British Columbia should come as no surprise. The limitations here comprise a limitation on the public offices for which the sheriff and the deputies can seek office and a prohibition from their sitting on juries. There is also a difficult question about whether they can act as justices of the peace.

This question of the restriction of civil rights must now be considered in the context of the *Canadian Charter of Rights and Freedoms*, because section 3 of the Charter declares:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

This declaration must of course be read with section 1 of the *Charter*. That section guarantees the rights and freedoms listed in the *Charter*, " . . . subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Is the limit on the right of sheriffs to stand for election and the prohibition of their sitting as jurors reasonable? Can the limits be demonstrably justified in this country?

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[10] The existence of the power of compulsory appointment is arguably confirmed by s. 4 of the *Constitution Act*, R.S.B.C. 1979, c. 62. That is the provision in which one would expect to find an abrogation of the English law if abrogation were intended.

[11] The only historical evidence touching on compulsory appointment is equivocal: *see* (1929) 58 Journals of the Legislative Assembly of the Province of British Columbia 42, where it is reported that the Attorney General was asked in the House: "Was one Harry Houstin appointed Sheriff of the County of Kootenay, except those portions comprised in the Revelstoke and Columbia Electoral Districts?" and "Did said Houstin subsequently decline acceptance of appointment, and for what reasons?" The answers given by the Attorney General were: "Yes." and "Yes. No reason given." This exchange may prove that the government thought that it had no power to require acceptance, but on the other hand, it seems odd, if there was no compulsory power, that the Crown would appoint someone, as the questions and answers suggest, without first determining whether he would accept.

[12] R.S.B.C. 1979, c. 386.

[13] *Qualification and Registration of Voters Act (1876) Amendment Act, 1878*, S.B.C. 1878, c. 22, s. 2.

[14] *An Act Amending the Law Relative to the Qualification and Registration of Voters*, S.B.C. 1883, c. 34, s. 2.

[15] *House of Commons Disqualification Act, 1975*, 23 & 24 Eliz. II, c. 24, s. 1 (2) and Schedule I, Part IV.

1. ELECTIONS

(a) Federal

At the federal level in Canada, both the *Canada Elections Act*[16] and the *Senate and House of Commons Act*[17] prohibit the election of sheriffs to the House of Commons by declaring them to be ineligible at an election. Section 21 (4) of the former statute goes farther by creating an offence for sheriffs who sign nomination papers consenting to be candidates when they know that they are ineligible.

There is much historical precedent for the prohibition. It has been said that sheriffs were ineligible at common law to sit in Parliament. Thus, during argument in *The Case of the Borough of Abingdon*,[18] counsel for the petitioner (who had moved to upset a sheriff's election to the House of Commons) said:[19]

> . . . and Prynne has preserved a return for Warwick of the 28th of Edward the First,[20] which proves, that the prayer of the Commons in the 13th of Edward the Third,[21] with regard to sheriffs, was founded on their ineligibility at common law.[22]

The prayer to which counsel made reference was apparently a Commons reaction to sheriffs' medieval abuses.[23] "In those days, the sheriff was the servant and instrument of the Crown in oppressing the subject. It was on that account that the Commons were so displeased, that any who held that office should be elected to serve in Parliament."[24] Despite the petition, "no definite step was taken against"[25] sheriffs until 1372:[26]

> In that year there was passed what appears to be an ordinance[27] containing this sentence: 'That hereafter no Man of the Law following Business in the King's Court, nor any Sheriff for the time he is Sheriff, be returned nor accepted Knight of the Shires; nor that they who are men of the Law and Sheriffs now returned to Parliament have any Wages.'

The next year, by Act of 46 Edw. III,[28] the clause called "Nolumus"[29] was inserted in the parliamentary writ of summons or election. It "definitely prohibited the election of any sheriff to parliament."[30]

And so it is in "the influence which the Crown had over them"[31] that one finds the first of three reasons which have been advanced for the prohibition against sheriffs seeking elective office. The second reason is that sheriffs were bound by statute and later by their oath of office to remain for their term in the county for which they were appointed. The statute seems to have been one of 46 Edw. III.[32] It was confirmed in 4 Hen. IV, c. 5 (1402), by which it was:

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[16] R.S.C. 1970 (1st Supp.), c. 14, s. 21. The provision declares "every person holding the office of sheriff" to be ineligible. Its application in British Columbia is not totally clear. Does it include a "fee for service" process server?

[17] R.S.C. 1970, c. S-8, s. 10.

[18] S. Douglas (Lord Glenbarvie), 1 *The History of the Cases of Controverted Elections* (1802) 419.

[19] *Ibid.* at 423.

[20] That was the year 1300: *see* G.S.P. Freeman-Grenville, *The Queen's Lineage* (1975) at 12.

[21] That was the year 1339: *Ibid.* at 14. *See also* H. Hulme, "The Sheriff as a Member of the House of Commons from Elizabeth to Cromwell" (1929) 1 Jo. Mod. Hist. 361 and H. Cam, *Law-Finders and Law-Makers in Medieval England* (1962) at 153-4.

[22] *See also The Case of the Town, and County of the Town of Southampton* in S. Douglas (Lord Glenbarvie), 4 *The History of the Cases of Controverted Elections* (1802) 87 at 93.

[23] Hulme, *supra*, note 21 at 361.

[24] *The Case of the Town, and County of the Town of Southampton*, *supra*, note 22 at 94.

[25] Hulme, *supra*, note 21 at 361.

[26] Hulme, *supra*, note 21 at 361.

[27] Part of the argument in each of *The Case of the Borough of Abingdon*, *supra*, note 18, and of *The Case of the Town, and County of the Town of Southampton*, *supra*, note 22, was devoted to the question of whether what was passed was an ordinance or a statute.

[28] *See* Hulme, *supra*, note 21 at 361; 2 *Rogers on Elections* (1928) at 5, note (a); and *The Case of the Town, and County of the Town of Southampton*, *supra*, note 22 at 97.

[29] It declared: "[N]either you nor any other sheriff of our said kingdom be in any-wise elected": *See* Sir W.R. Anson, *The Law and Custom of the Constitution* (4th ed. 1909) Part I at 82.

[30] Hulme, *supra*, note 21 at 361. *See also* C.H. Karraker, *The Seventeenth-Century Sheriff. A Comparative Study of the Sheriff in England and the Chesapeake Colonies, 1607-1689* (1930) at 31.

[31] *The Case of the Town, and County of the Town of Southampton*, *supra*, note 22 at 98.

> . . . ordained and assented, That every sheriff of *England*, shall abide in proper person within his bailiwick, for the time he shall be such officer . . . and that the said Sheriff be sworn from time to time to do the same in special amongst other articles comprised in the oath of the sheriff.[33]

The requirement to reside in the county was a strict one; royal permission was required even before a sheriff could go to London to do business.[34] Thus, for all but the sheriff of Middlesex (presumably), Parliament was out.[35]

The third reason given for the historical ineligibility of sheriffs is that election to the House of Commons was incompatible with the sheriff's duty as parliamentary returning officer. Anson says that the sheriff has been returning officer since "the beginning of our Parliamentary history."[36] This fact is confirmed by the editors of Mather:[37]

> The fourteenth article of Magna Carta dealing with the constitution of the Great Council declared on behalf of the King 'We will cause to be summoned the archbishops, bishops abbots and greater barons singly by our letters; and besides we will cause to be summoned in general by our sheriffs and bailiffs all those who hold of us in chief.' Thus the sheriff appears in 1215 as the recognized returning officer and, indeed, for many years previously they had been accustomed to receive writs commanding them to summon delegates from their counties when occasions required.

But it was not until 1601 (apparently) that the argument was first made that sheriffs should be ineligible because "they would have to act in their own elections."[38] Experience had proven, even when they were not candidates, that sheriffs took advantage of "the splendid opportunities presented for the use of personal influence and of corrupt manipulation."[39] The argument took hold. The sheriffs' threat as a royal officer had long since diminished and when the requirement of residence was removed from the oath,[40] the returning officer argument remained as the reason for exclusion.[41] It remains today in England in the *House of Commons Disqualification Act, 1975*,[42] although in an attenuated form. The high sheriff of Greater London is disqualified from membership in the House for any constituency comprising any part of Greater London. The high sheriffs of counties in England and Wales are disqualified for any constituency comprising the whole or part of the area for which they are appointed.[43]

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[32] *Ibid.*

[33] *See also* Karraker, *supra*, note 30 at 4-5 and Hulme, *supra*, note 21 at 363.

[34] Karraker, supra, note 30 at 4.

[35] *See, e.g., The Case of Walter Long*, (1629) 3 St. Tr. 234. Long had been made High Sheriff of the County of Wiltshire and had sworn the oath. But he was also elected to Parliament. He remained at Westminster when he should have been in the County. In the Star-Chamber, he was found guilty of "a great and presumptuous Contempt against his majesty," and was "committed to the Prison of the Tower, there to remain during his majesty's pleasure, and also to pay a fine of 2,000 marks to his majesty's use." Both Karraker, *supra*, note 30 at 5, and C.D. Bowen, *The Lion and the Throne* (1956) at 472, suggest that it was the residency requirement which kept Sir Edward Coke out of Parliament in 1626. Apparently Coke had himself ruled from the Bench that sheriffs were ineligible: *see* W.S. Holdsworth, 5 *A History of English Law* (3rd ed., 1945) at 449, and T.F.T. Plucknett, *A Concise History of the Common Law* (4th ed., 1948) at 245. Holdsworth cites "Coke S.P. Dom. 1619-1623, 311; cxxiii, 118" for the case. Plucknett gives no citation.

[36] Anson, *supra*, note 29 at 102.

[37] *Mather on Sheriff and Execution Law* (3rd ed., 1935) at 7.

[38] Rogers, *supra*, note 28 at 6. In *Reg.* v. *Owens*, (1859) 28 L.J.Q.B. 316, Lord Campbell C.J. said at 317: "Upon the maxim that no man shall be judge in his own cause, I am of opinion that a returning officer cannot be allowed, in the election at which he presides, to return himself." Erle J., at 318, put it a little differently: ". . . the law . . . will not allow the right performance of his duty to be endangered by his becoming a candidate at the election over which he presides." *See also The Queen* v. *Blizard*, (1866) 36 L.J.Q.B. 18; *The Queen* v. *White*, (1867) 36 L.J.Q.B. 267; *Fanagan* v. *Kernan*, (1881) 8 L.R. Ir. C.P. 44; and *The Queen* v. *Morton*, (1891) 61 L.J.Q.B. 39.

[39] Karraker, *supra*, note 30 at 32. *See also The Case of the Borough of Abingdon*, *supra*, note 18 at 426 where it is ". . . the opportunities of partiality and undue influence."

[40] 3 Geo. I, c. 15, s. 18 (1663).

[41] *See, e.g.*, G. Atkinson, *Sheriff-Law* (1854) at 7, and C. Churchill, *The Law of the Office and Duties of the Sheriff* (1882) at 22.

[42] 23 & 24 Eliz. II, c. 24, s. 1 (2).

[43] *Ibid.* Schedule I, Part IV.

These English statutory limitations reflect the development of the eligibility rule over the centuries.[44] In *The Case of the Town, and County of the Town of Southampton*,[45] a Committee of the House of Commons declared that the sheriff of Hampshire was not ineligible for election for the town of Southampton.[46] Today, sheriffs in England are still sometimes returning officers,[47] and it is undoubtedly for this reason that the prohibition in the *House of Commons Disqualification Act, 1975*[48] is worded the way it is.

The impression should not be left from this discussion that sheriffs were ever ineligible to sit in the House of Lords. Certainly they have been eligible since 1583 at least. That year, *Sir Lewis Mordant's Case* was decided.[49] The full report is worth quoting:

> Memorandum. He was Sheriff of the Counties of Bucks and Bedford. Lord Mordant his Father died, 20th April, *tempore Parliamenti*. It was held by all the Justices, and the Attorney and Solicitor of the Queen, that his Office by this matter is not determined, although he be now a Baron of Parliament, and that he yet remaineth Sheriff . . .

There seems to be no Canadian legislation which would prohibit a sheriff or his deputy from accepting a seat in the Senate of Canada.[50] In the absence of legislation, it must be assumed that *Mordant's Case* governs.

(i) *Senior Employees*

An answer to the question of whether the limits on the right of sheriffs to seek elective office or to accept seats if elected requires consideration of two classes of employees in sheriff services. First, there are those who are excluded from the process of collective bargaining.[51] These are those people who could be called "sheriffs." They are the director of sheriff services, his or her assistant if there is one, arguably the regional and district managers (if it can be said that they are "deputies"), the local managers, and those deputies who have been given supervisory responsibilities. All these people are public servants and all of them are subject to section 50 of the *Public Service Act*:[52]

> An employee shall not engage in remunerative employment with another employer or carry on a business, except with the commission's approval.

On one interpretation of this provision the federal proscription of Parliamentary service is rendered unnecessary.

It can be argued, because of a not unreasonable expectation that these employees will work a full day for the Province each working day of the year, that senior officials in sheriffs services, as long as they wish to keep their employment, are as a practical matter and unless permission can be obtained, excluded from standing for election as Members of Parliament. The argument depends, of course, on whether it can be said that elective office of this kind is an "employment" and that the people of Canada are an "employer."

This class of employee is not guaranteed approval by the Public Service Commission of plans to seek election for or to sit in Parliament. For obvious reasons, it is unlikely that permission would be granted to any employee who proposed to take up another full-time job. The likelihood that approval would be refused becomes important when it is noticed that there is no guarantee that leaves of absence would be granted to these senior employees to enable them to stand for election. As noted, by operation of section 21 of the *Canada Elections Act*[53] "sheriffs" would have to resign their positions even before they sign nomination papers. They would resign at the risk of having no employment to which they could return should their bid be unsuccessful.

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[44] The eligibility rule also extended to mayors and other borough officers.

[45] *Supra*, note 22.

[46] *Ibid.* at 143.

[47] *Representation of the People Act, 1949*, 12, 13 & 14 Geo. VI, c. 66, s. 17.

[48] 23 & 24 Eliz. II, c. 24, Schedule I, Part IV.

[49] (1583) Cro. Eliz. 12, 78 E.R. 278.

[50] However, if the sheriff or deputy wanted to continue working in sheriff services after taking up the appointment, he would have to obtain permission from the Public Service Commission: *see Public Service Act*, R.S.B.C. 1979, c. 343, s. 50.

[51] *Public Service Labour Relations Act*, R.S.B.C. 1979, c. 346, s. 1 (1).

[52] R.S.B.C. 1979, c. 343.

None of the reasons that were once popular for excluding the sheriff from Parliament apply today. The sheriff is no longer a dangerous royal officer. He is not in any event a *federal* Crown official.[54] Nor is he a returning officer for federal elections.[55] And of course there is no residence requirement which could have any bearing on eligibility to serve. Nonetheless, the fact that sheriffs are officers of the court renders reasonable the limits contained in the *Canada Elections Act*[56] and *Senate and House of Commons Act*.[57] These limits ensure that sheriffs will not campaign and will not sit as members as long as their duty to the court exists. These limits are reasonable because they do not restrict activity which could not be said to be objectionable and they can be demonstrably justified in a free and democratic country because a free and democratic country depends for its freedom and democracy on an independent judiciary. No judiciary will be seen to be independent whose officers enter the political fray. Think only of the case of a sheriff directed to execute a writ against the political party which supports his bid for Parliament. Would any reasonable citizen not question his ability to act impartially and would the integrity of the court not be called into question no matter how diligently he acted?

In light of the patently political character of some appointments to the Senate, it is probably desirable for the same reason to prohibit sheriffs from accepting appointments to that Chamber.

Attention might be paid to the question of whether participation by sheriffs in any form of political activity — e.g., fund raising — should be prohibited. Maintenance of the integrity of the judicial system strongly favours prohibition. For a contrary approach, see ***Regina ex rel Medynski* v. *Hill***,[58] where it was held that a man who had contracted with a sheriff to serve process was not disqualified from serving as a local alderman. Gerein D.C.J. said:[59]

> But I cannot see how serving processes, interviewing debtors, taking inventory, driving the sheriff, acting under extra-judicial processes can interfere with or in any way affect the responsibilities which attach to a seat on the city council. Nor can an alderman's duties in any way conflict with the duties of a general handyman or process server.

These are not the points that need to be addressed.

(ii) *Junior Employees*

The suggestion that the "sheriff" continue to be prohibited from standing for or sitting in Parliament applies with equal force to the second class of regular employees in sheriff services. These are the unionized deputy sheriffs. In England, no one but the sheriff himself was ever disqualified.[60] Section 50 of the *Public Service Act* applies to this class of employees as it did to the senior level,[61] but additional protection is given to the class by the Master Agreement[62] made between the union and the government. Article 20.04 of that Agreement requires the government, on written request, to grant a leave of absence without pay

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[53] R.S.C. 1970 (1st Supp.), c. 14, s. 21.

[54] Provision for the appointment of "federal sheriffs" is made in s. 13 (1) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, but there have been no appointments. In practice, the provincially appointed sheriffs and deputies are used under the authority of s. 13 (2). If there were federal sheriffs and if they were federal public servants, then they would be ineligible to sit as members of the House of Commons: *see Senate and House of Commons Act*, R.S.C. 1970, c. S-8, s. 10.

[55] Although he could be, because there are no qualifications which would prevent him from doing the work: *see Canada Elections Act*, R.S.C., 1970 (1st Supp.), c. 14, s. 7. It seems that the only duty the sheriff still has in connection with federal elections is to deliver ballot boxes to the returning officer when they have been left in the sheriff's custody after the last election. *See* s. 30 (4). The boxes may be left in the sheriff's custody under the authority of s. 55 where there is no building owned or occupied by the government of Canada at the place at which the addition of votes was held. Provision is made in s. 13 of the *Canada Temperance Act*, R.S.C. 1970, c. T-5 for the appointment of the sheriff, among other listed people, as returning officer for cases under the *Act*. This provision should have no bearing on whether sheriffs are eligible to sit as members of Parliament.

[56] R.S.C. 1970 (1st Supp.), c. 14, s. 21.

[57] R.S.C. 1970, c. S-8, s. 10.

[58] (1953) 9 W.W.R. 656 (Sask. Dist. Ct.).

[59] *Ibid.* at 659.

> (a) for employees to seek election in a Municipal, Provincial or Federal election for a maximum period of ninety (90) days;
>
> . . .
>
> (c) for employees elected to a public office for a maximum period of five (5) years.

Unsuccessful candidates "shall be allowed to return" to their positions on the authority of Article 32.07 (b).

It does not seem that the *Canada Elections Act*[63] or *Senate and House of Commons Act*[64] applies to "sheriff's officers." The opinion has been expressed already that they are not "deputies." If they are not "deputies," then they are not included in the prohibition because they would not be "sheriffs," even under the wording of the federal *Interpretation Act*.[65] However, it does seem that the statutes would apply to "fee for service" process servers appointed as "deputy sheriffs" under section 2 (2) of the *Sheriff Act*. Here is an anomaly to which attention should be given if it is not thought appropriate to exclude all officers of the court from participation as candidates in political campaigns and from membership in the House of Commons or Senate.

(b) *Provincial and Municipal*

No provincial legislation declares that anyone in or working for sheriff services is ineligible for election to the Legislative Assembly of the Province.[66] Section 50 of the *Public Service Act* seems to be the only control.[67] By section 82 of the *Municipal Act*,[68] any person who is a "sheriff or sheriff's officer"[69] is "disqualified from being nominated, being elected and from holding office" as a member of a municipal council — at least a municipal council other than the council for Vancouver, because the *Vancouver Charter*[70] does not contain a similar provision. The sheriff is not the returning officer in municipal elections[71] and for that reason the prohibition contained in section 82 cannot be justified. It can be justified, however, in light of the sheriff's status as officer of the court. Indeed, it may be desirable to extend the limit at these levels and federally to cover every employee of sheriff services. Only then could society ensure that justice will be seen to be done.[72]

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[60] The problem probably never arose because it is likely that none of the underlings had sufficent social status to enable them to stand for election.

[61] It also applies to "sheriff's officers," but not to "fee for service" process servers appointed "as" deputy sheriffs under s. 2 (2) of the *Sheriff Act*, R.S.B.C. 1979, c. 386.

[62] *See* Chapter III, section G.

[63] R.S.C. 1970 (1st Supp.), c. 10, s. 21.

[64] R.S.C. 1970, c. S-8, s. 10.

[65] R.S.C. 1970, c. I-23, s. 2 (1).

[66] It is not insignificant to note, however, that neither the sheriff nor his deputies or officers are disqualified from acting as returning officers: *see Election Act*, R.S.B.C. 1979, c. 103, s. 35.

[67] R.S.B.C. 1979, c. 343.

[68] R.S.B.C. 1979, c. 290.

[69] Are these words sufficiently broad to capture "fee for service" process servers?

[70] S.B.C. 1953, c. 55.

[71] Almost anyone, including a sheriff or deputy sheriff, could be a returning officer for a municipal election: *see Municipal Act*, R.S.B.C. 1979, c. 290, s. 84.

[72] In *Regina* v. *Brass*, [1981] 4 W.W.R. 657 (B.C.S.C.), Locke J. upheld a challenge to the array because a *clerk typist*, who was employed by sheriff services and who helped to return the panel of jurors, was the wife of Crown Counsel. There must not, His Lordship said at 658, be the "slightest ground whatsoever" for anyone to suggest that there had been interference with the administration of justice.

2. JURIES

Morris[73] confirms that sheriffs sought exemption from jury service as early as the thirteenth century, undoubtedly because the service was unremunerative and because it limited the opportunities which otherwise existed for them to exploit their office. But by 1824, an Act of 6 Geo.IV[74] left no doubt that sheriffs and their officers were disqualified from serving. There is good reason for the disqualification. It has always been the sheriff's job to return juries and it is obviously inappropriate for the person who summons jurors to join them in the jury box. Both the fact and the appearance of impartiality would be jeopardized. In British Columbia, where sheriff services provides courtroom security and supplies the deputies who escort prisoners to and from the courts,[75] participation by a sheriff or his deputy in the deliberations of a jury would be especially inappropriate. It is not right that someone should guard a prisoner one day and sit in judgment on him the next.

For these reasons, only a small point need be made about the relevant provision of the *Jury Act*.[76] That section disqualifies any person from serving as a juror in a criminal or civil trial who is "(h) an employee of the Ministry of the Attorney General of the Province" or "(k) a sheriff or sheriff's officer."[77] Paragraph (h) would in theory disqualify all employees, and certainly the assistant to the director of sheriff services, the regional and district managers, the auxiliary employees called "sheriff's officers" who assist the deputies in managing juries, and all stenographers and clerks employed by the Ministry in a sheriff's office. Paragraph (k) would disqualify the director of "sheriff services, any sheriffs there might be, all deputy sheriffs (because of section 23 (2) of the *Interpretation Act*).[78] and arguably the auxiliary employees.

Paragraph (k) does not exclude "fee for service" process servers. These people are independent contractors who could not therefore be "employees" of the Ministry. However, these people arguably fall within the definition of "sheriff" in section 1 of the *Jury Act*:[79] "any person lawfully holding the office of sheriff or lawfully performing the duties of sheriff by way of delegation, substitution, temporary appointment or otherwise." This is as it should be. These process servers may not look like sheriffs,[80] but the public sees them act like sheriffs. And it would be quite improper for a person arguably representing the Queen, who serves a defendant with a writ of summons in an action at Her suit to sit as a juror when the case is called for trial. Equally, it is not desirable that the court's executive officer should be seen to be a trier of fact.

It has already been suggested that the definition of "sheriff" in section 1 of the *Jury Act* be repealed. To clarify things and to ensure that "fee for service" process servers cannot sit on juries, it is further suggested that paragraph (k) of section 3 of the *Jury Act* be amended to provide:

> . . . any employee of sheriff services or any person under contract to sheriff services for the purpose of discharging any duty for which the office of sheriff is responsible, either by the common law or by an enactment.

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[73] *Supra*, note 1 at 178, footnote 81.

[74] *An Act for Consolidating and Amending the Laws Relative to Jurors and Juries*, 6 Geo. IV, c. 50, s. II. Sheriffs were disqualified as "officers of the court" and under-sheriffs as "solicitors."

[75] *See* the discussion of these responsibilities in Chapters VI and VIII.

[76] R.S.B.C. 1979, c. 210.

[77] *Ibid*. s. 3.

[78] R.S.B.C. 1979, c. 206.

[79] R.S.B.C. 1979, c. 210.

[80] They do not wear the uniform issued to the regular deputies.

All of what has been said in this section applies equally to the *Coroners Act*.[81] Under the authority (it seems) of section 51 (4) of the Act, sheriff services is used to return jurors for inquests. By section 31 of the Act, section 3 of the *Jury Act*[82] is made to apply. However, the definition of "sheriff" contained in section 1 of the *Jury Act* is not imported and that means that unless section 3 is amended as suggested, "fee for service" process servers are not disqualified. These people are sufficiently connected with the administration of justice to warrant their exclusion, even though in fact they may never actually summon a juror to an inquest.

3. JUSTICE OF THE PEACE

In 1547, there was apparently a crisis in the administration of justice in England. Suits were not heard when they ought to have been and "demandants, plaintiffs and actors . . . were compelled and driven by the order of the laws of th[e] realm, for their further remedy, to commence and begin again his or their . . . actions, suits or plaint. . . ."[83] The problem seemed to lie in a lack of suitable officials to hear the cases. The solution was a statute of 1 Edw. VI which provided:[84]

> That albeit any person or persons, being justice of assize, justice of gaol-delivery, or justice of peace . . . shall fortune to be made or created . . . sheriff, yet that notwithstanding, he and they shall remain justice and commissioner, and have full power and authority to execute the same, in like manner and form as he or they might or ought to have done before the same.

By *Magna Carta*, it had been provided that "No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown."[85] McKechnie explains:[86]

> The main object of this provision is not open to doubt: men accused of crimes must be tried before the King's judges and not by local magistrates of whatsoever kind. Innocent men dreaded the jurisdiction of the local tyrants whose harshness had earned widespread hatred. The sheriffs and castellans deserved their bad repute: the records of the age overflow with tales of their cruelties and oppressions.

So the law of Edward VI was a radical change, but it was short-lived. It was not "convenient," as a statute of Mary in 1553 declared.[87] That enactment restored the Great Charter rule by providing:

> . . . That no manner of person or persons having, using or exercising the office of the sheriff of any county or counties, shall use or exercise the office of the justice of the peace, by force of any commission or otherwise, in any county or counties where he or they shall be sheriff, during the time only that he or they shall use or exercise the said office of sheriffwick. . . .

It was this rule that was "received" in 1858[88] in the Colonies from which the Province of British Columbia was later created. The Order in Council of 1856,[89] which established a Supreme Court of Civil Justice for Vancouver's Island and which authorized the governor to appoint a sheriff for that Colony, did not abrogate the English rule.

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[81] R.S.B.C. 1979, c. 68.

[82] R.S.B.C. 1979, c. 210.

[83] 1 Edw. VI, c. 7, preamble.

[84] *Ibid.* s. IV.

[85] W.S. McKechnie, *Magna Carta* (2nd ed., 1914) at 304.

[86] *Ibid.* at 305.

[87] 1 Mar., sess. 2, c. 8.

[88] *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2. In 1875, the statute of Mary was confirmed as the law in England: *see Ex parte Colville*, (1875) 1 Q.B.D. 133.

[89] *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council* (4 April 1856).

In the mainland Colony of British Columbia, however, a different situation prevailed. The *Sheriff's Act, 1860*[90] abrogated the English rule because it was "expedient to enable the High Sheriff of British Columbia to act as a Justice of the Peace during his Shrievalty."[91] Governor Douglas, who had to contend with an influx of American miners into the Cariboo,[92] faced a crisis like that which prompted action by the legislators in the time of Edward VI. Nonetheless, the *Sheriff's Act, 1860* was repealed by the *Sheriffs' Ordinance, 1867*.[93] The Ordinance followed on the union of the Colonies and was designed "to assimilate the Law relating to Sheriffs in all parts of British Columbia."[94] It contained a provision rendering lawful the acts done or to be done by sheriffs as justices of the peace.[95] Thus, the rule re-established by the Act of Mary was rejected as the law in British Columbia, and until the revised *Sheriffs Act* of 1897[96] was proclaimed, there was always a statutory provision in the Province enabling sheriffs to do the work of justices of the peace. Since 1897, the legislation has been silent on the point.

The difficult question now is whether a silent "repeal" of the provision brought a restoration of the common law rule represented by the statute of Mary. It is usually said that the repeal of a statute which has changed the common law does not restore the common law.[97] If that is the case, then the repeal by omission in British Columbia would have no effect. Curiously, the rule brought into the Province in 1860 to meet particular times would continue to be the law.

This problem is worth mentioning because it is not desirable that sheriffs or deputy sheriffs should do the work of justices of the peace. It is inappropriate, for instance, for the same person to sign a warrant issued by a court and to execute it.[98] Blackstone put it properly when he explained the sense of the *Magna Carta* rule:[99]

> For it would be highly unbecoming, that the executioners of justice should also be the judges; should impose as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office: for this would be equally inconsistent; he being in many respects the servant of the justices.[100]

For these reasons, and because it is no longer necessary to have the sheriff do both jobs, it is suggested — for certainty's sake — that the *Sheriff Act*[101] be amended to provide that no employee of sheriff services and no person who contracts with sheriff services to perform any of the duties of the sheriff may act as a justice of the peace so long as he is so employed or is under contract.

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[90] This was the Proclamation of His Excellency James Douglas, Governor of the Colony of British Columbia.

[91] *Ibid.* preamble.

[92] *See* D.R. Williams, *The Man for a New Country* (1977) at 64: "   by far the greater number of miners flocking into this area in 1858 and 1859 came from California." But Williams also makes the point that they were not a "lawless horde. What must be realized,   is that colonial officials believed and worried that they *might* become lawless, they *might* turn to vigilantism, they *might* hold lynching parties, they *might* flout British law, and the officials reacted accordingly."

[93] R.S.B.C. 1871, No. 68 [5 March 1868], s. 1.

[94] *Ibid.* preamble.

[95] *Ibid.* s. 3.

[96] R.S.B.C. 1897, c. 172.

[97] That is what s. 35 (a) of the *Interpretation Act*, R.S.B.C. 1979, c. 206, seems to say. *See also* E.A. Dreidger, *The Construction of Statutes* (1974) at 172-3, where a similar provision is said to dispense with *A Case at a Committee Concerning Bishops*, (1606) 12 Co. Rep. 7, 77 E.R. 1290. But *quaere* the effect of the repeal of a provision confirming the common law.

[98] *See, e.g.*, ss. 2 and 741 and Form 19 of Part XXV of the *Criminal Code*, R.S.C. 1979, c. C-34.

[99] 1 Bl. Com. 344. *See also* J. Impey, *The Office of Sheriff* (1786) at 53.

[100] Although the proper officer to the justices of the peace was the constable: *see Regina v. Wyatt*, (1705) 2 Ld. Raymd. 1189, 92 E.R. 286 *per* Powys J. at 1287 and *per* Powell J. who said at 288: "But ever since justices of the peace have been elected, constables have been their officers, and constant experience is so. Secondly, justices of peace cannot command the sheriff, unless power is given them so to do in the Act of Parliament."

[101] R.S.B.C. 1979, c. 386.

C. The Uniform

Deputy sheriffs must "be properly dressed in uniform at all times when on duty" in the Province.[102] There is sometimes good reason for distinctive dress on deputies. But surprisingly, while there is much historical support for official costume of sorts for sheriffs, there is no historical or legal precedent for the kind of uniform the deputies wear today.[103]

The story is told[104] that in 1878 the High Sheriff of Derby, dressed in a morning suit, met the Assize judges, Hawkins and Fry JJ., at the railway station as they arrived to perform their commission. Hawkins J. was displeased with the sheriff's appearance and when the sheriff learned from His Lordship that the alternative to court dress or a military uniform was a fine of 500 pounds,[105] he appeared in court the next day in the uniform of a Captain of Volunteers.[106] It seems that the County was "thrown into a ferment"[107] by the action of the judge, whose conduct was nevertheless defended this way:[108]

> The Judges represent the Sovereign at the Assizes, and the High Sheriff is bound to attire himself as though he were in the royal presence. This compliment or duty is not paid to the Judges personally, but to Her Majesty, as represented by her commissioners. But, apart from the rule, there can be no question that the state and pomp wherewith Judges are received at Assizes impress the popular mind with the sanctity of justice, and the respect due to the law and the administrators of the law. The antiquity of our law, its unbroken tradition, its permanent power, strike upon the imagination, when the pomp and circumstance of eight centuries are year by year presented to the eye.

Today in England there are still splendid displays,[109] but the time has long past for servants "liveryed in greene sattin doublets."[110]

In this Province, a morning suit is the "proper dress" for each manager of sheriff services who attends in his town to open the Assize Court sittings of the Supreme Court of British Columbia.[111] This requirement of some degree of formality — by colonial standards — is presumably a recognition of the need to impress "the popular mind by the outward majesty of the law"[112] — a need which is less easily dismissed than some would suggest.

Despite assurances made by the Attorney General in 1975 that sheriff services was a "civilian force,"[113] the deputies dress today in a manner remarkably similar to that of the law enforcement bodies with whom they were then contrasted. The basic uniform consists of a brown cap, tunic or blazer, and tie, and a khaki shirt and trousers.[114] The cap, tunic and shirt are of a distinctly police style.[115] On the front of the cap rests a badge showing the provincial crest and on the shoulders of the shirt, tunic and blazer there are identifying patches. Rank badges are worn on the shirt and on the tunic.

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[102] Court Services Circular 9/78, 8 June 1978, and Province of British Columbia, Ministry of Attorney General, *Sheriff Services Operating Manual*, at chapter 2, page 22. Neither the sheriff's officers nor the "fee for service" process servers wear the distinctive uniform. They usually wear a brown blazer. The director of sheriff services, his assistant and the regional and district managers all wear conventional business attire. Most of the local managers wear a uniform.

[103] There is no legislation requiring deputies to wear uniforms of any kind. The decision to require them was made in 1974 by senior officials of the Ministry of the Attorney-General.

[104] *See* Anon. "Official Costume" (1878) 14 Can. L. J. 260.

[105] That was a modest penalty in comparison with those meted out in earlier times. Cam, *supra*, note 21 at 53, reports that: " the sheriff of Hereford, Roger of Elmbridge, held the shire court clothed in the suit which the barons had given to their knights to know them by, and for this insult to the king he was found guilty of treason and hanged in that very suit, in February 1322, so that the punishment might fit the crime for all men to see."

[106] Had the sheriff chosen to wear court dress, he would have appeared wearing a " black velvet dress court suit, with knee breeches and silk stockings, or claret coloured coat and trousers, the coat being of same shape as dress uniforms of consuls and members of diplomatic corps, and the trousers having a gold stripe ": *see* P.F. Mather, *A Compendium of Sheriff Law* (1894) at 11. *See also* J. Derriman, *Pageantry of the Law* (1955) at 112.

[107] *Supra*, note 104 at 260.

[108] *Ibid.* at 261.

[109] *See, e.g.*, Council of the Shrievalty Association, *Guide to the Office of High Sheriff* (1979) at 7-8 and I. Gladwin, *The Sheriff: The Man and his Office* (1974) at 380. Not everyone has always favoured court dress or a military uniform: *see, e.g.*, Appendix H to the *Report from the Select Committee of the House of Lords on High Sheriffs* Cmd. 257 (1888).

[110] Karraker, *supra*, note 30 at 24.

[111] *See* Court Services Circular 7/79, 26 October 1979 and page 3-45 of the *Sheriff Services Operating Manual*. If managers are equated with under-sheriffs, then "morning dress" is appropriate if the English tradition is to be followed: *see* Derriman, *supra*, note 106 at 114. But Mather, *supra*, note 106 at 11, says that under-sheriffs "usually wear evening dress."

[112] *Supra*, note 104 at 261.

[113] It was the Hon. Mr. Macdonald at the time: *see* (1975) 2 *Debates of the Legislative Assembly for British Columbia* at 955.

Dress regulations are strict, including an injunction against wearing "unauthorized items of civilian dress with uniform."[116] This injunction does not prevent union deputies from wearing recognized union insignia, because they are given the right to do so by the Master Agreement.[117] The Component Agreement prohibits the government from changing the style or colour of the uniform without first consulting the union.[118] Deputies and sheriff's officers must have their hair neatly styled and must ensure that it " . . . is not at variance with the high standards adopted by uniformed members of law enforcement agencies."[119]

In England over the centuries, except when he attended the judges on assize, the sheriff "fulfilled all his duties in the everyday dress of his period."[120] He did so, even though he was *principalis conservator pacis*.[121]

It is only in connection with their duties escorting and guarding prisoners that a uniform similar to those sanctioned by police departments is either necessary or desirable for deputy sheriffs. For escort and guarding work,[122] a functional and distinctive uniform is definitely needed. The uniform now used is unexceptionable for that purpose, but the same kind of uniform need not necessarily be worn by deputies discharging any of the other duties of the office of sheriff. It seems that when uniforms were adopted in the mid-1970s at the time that the sheriff's responsibilities increased so markedly, no one had thought that they would be worn except by deputies engaged in escort duties and in providing court security. Since then uniforms for all kinds of work became mandatory.

One argument advanced in support of uniforms is that they make the people wearing them easily identifiable.[123] But that argument is as much an argument against uniforms as it is in favour of them. Lawyers have complained, and deputies have said, that they think that service of documents is sometimes frustrated because the people to be served are alerted by the officers' distinctive dress and their marked car and are able to take evasive action.

Uniforms are also said to confer authority. That may be so in some places — such as the jails and the courts — but many deputies have said that members of the public do not know who they are even when they appear in uniform[124] and that the real test of authority is manner, not uniform.[125] Indeed, some statutes acknowledge that fact because many seizures can be made by people who are not uniformed. Thus, for example, inspectors under the *Bee Act*,[126] collectors under the *Municipal Act*[127] and bailiffs under the *Repairers Lien Act*[128] can interfere with property rights, even though they may do so in plain clothes.

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[114] "Female employees required to wear uniforms shall be provided with appropriately tailored pant suits at the employees' request."; *see* Article 7.02 (b) of the *Component Agreement* made between the government and the union of public servants on 7 November 1979 at 14.

[115] One version of the tunic, the "Eisenhower" or bomber jacket, has a military origin.

[116] *See* Court Services Circular and *Sheriff Services Operating Manual*, *supra*, note 102.

[117] *Supra*, note 62, Article 1.08 at 17.

[118] *Supra*, note 114, Article 7.02 (c) at 14.

[119] *See* Court Services Circular 10/79; 29 November 1979 and page 2-21 of the *Sheriff Services Operating Manual*.

[120] Derriman, *supra*, note 106 at 112. Uniforms are not essential. For example, in Saskatchewan, none of the people doing the work of the sheriff wears a uniform.

[121] Co. Inst. Part I at 168b.

[122] Guards at provincial correctional centres are required to wear uniforms: *see* Rule 10 of B.C. Reg. 284/78, made pursuant to the *Correction Act*, R.S.B.C. 1979, c. 70, s. 47 (1).

[123] Section 2 of the *Criminal Code*, R.S.C. 1970, c. C-34 makes sheriffs, deputy sheriffs and sheriff's officers "peace officers" and s. 119 creates an offence punishable on summary conviction for anyone who "not being a peace officer . . . uses a badge or article of uniform . . . in a manner that is likely to cause persons to believe that he is a peace officer." There is a similar proscription of personation in the *Sheriff's Act, 1887*, 50 & 51 Vict., c. 55, s. 29 (b).

For the reasons given, uniforms of a military or police style are not required for the work of most deputy sheriffs. This conclusion is supported by the remark of Mr. N. R. Whitty, of the Scottish Law Commission, who wrote to say that sheriff officers in Scotland do not wear uniforms and that " . . . [i]f they did, it would simply embarrass further those debtors whose homes are visited. . . ." Mr. Whitty added, on the point of necessity, "that in many areas, each local sheriff officer's identity is well known." That would certainly be the case in many of the rural regions of this Province.

It seems much more desirable, all things considered, that all the employees of sheriff services who wear caps and uniforms should instead go about bare headed and should wear a simple blazer or full tunic with an identifying patch over the breast pocket. This look would not be alarming, but it would be distinctive when distinction is necessary. It would also be more in keeping with the "civilian" cast of the work. Perhaps most important, it would be significantly more dignified than is the present dress. Dignity is not something to be scoffed at, particularly when it is remembered that most of the sheriff's important work is work as a servant of the courts. The more a deputy looks like a policeman, the more he will be seen to be one.

D. The Use of Arms

When sheriff services began its dramatic growth in British Columbia in the middle of the last decade, concern was expressed about arming the deputies. In the Legislative Assembly, the Honourable Mr. Macdonald, who was then the Attorney General, answered the concern by saying:[129]

> At one point, I think, my department was accused of ordering 50,000 handguns. Somebody went around the province saying that we had got this order. When we ran into this incident that the Hon. Member mentioned, I said: 'How many have we got?' The answer came back: 'We've got 12.' They were being used primarily in the sheriffs' training classes out at BCIT for training. So I said: 'Order another 12. Double the number—but don't order 50,000 under any condition.'

There are now of course more than 12 guns. Their use is strictly regulated.[130] To suggest that some deputies at some times should not bear arms is to look at life with blinders on.

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[124] The same problem was acknowledged in Scotland by the Scottish Law Commission: *see* its *Fifth Memorandum on Diligence: Administration of Diligence* (Memorandum No. 51) October 1980 at 95, para 6.9. The Commission recommends the issuance of identity cards to all sheriff officers (in the Sheriff Courts), although one wonders whether they need be issued to messengers-at-arms (in the Court of Sessions): "A messenger-at-arms is given by the Lyon King of Arms [who has the power of appointment] a messenger's wand and blazon [heraldic shield]. In the event of deforcement [successful opposition], the messenger 'breaks' the wand, a procedure of mediaeval provenance which would certainly puzzle, if not impress, the offending party."

[125] This impression is confirmed by a recent study of police uniforms in California: *see* J.H. Tenzel, L. Storms and H. Sweetwood, "Symbols and Behavior: An Experiment in Altering the Police Role" (1976) 4 Jo. Police Sc. 21, at 27. For a curious example of the necessity for a uniform, in another context, *see Gasoline (Coloured) Tax Act*, R.S.B.C., 1979, c. 151, s. 29 (3): "If a police officer in uniform finds in any motor vehicle any gasoline coloured purple . . . "

[126] R.S.B.C. 1979, c. 27, s. 4 (3).

[127] R.S.B.C. 1979, c. 290, s. 449.

[128] R.S.B.C. 1979, c. 363, s. 9 (1).

[129] *See* (1975) 2 *Debates of the Legislative Assembly for British Columbia* at 1300.

[130] *See generally* pages 2-59 to 61 of the *Sheriff Services Operating Manual and see*, particularly, item 12, at 61: "The only circumstance under which a firearm may be removed from its holster is during the course of LEGAL duty when the deputy sheriff's LIFE—or the LIFE OF ANOTHER—is threatened with DEATH or GRIEVOUS BODILY HARM and there is NO LESS VIOLENT MEANS AVAILABLE."

All the deputies are trained in the use of revolvers but they are not supplied with them as part of their personal equipment.[131] In and about courtrooms, where the deputies are responsible for security, the ultimate decision about whether to arm anyone rests with the judges and, in Vancouver in the superior courts, specifically with the Chief Justices of the Supreme Court and of the Court of Appeal. In practice, the judges are made aware by the deputies, who are sometimes informed by the police, of special security risks which might justify the issuance by the district manager or senior deputy sheriff of a handgun to a deputy to be carried into court.[132] On escort duties, the deputies are not usually armed, although they can be when escape attempts are anticipated.[133] For escorts, the decisions about whether to issue arms and about whether armed police assistance is required are made by the district manager or by the senior deputy sheriff in charge.[134]

There is authority at common law confirming the ancient right of sheriffs and their officers to bear arms in the discharge of their responsibilities.[135] By a statute enacted in 1541,[136] all persons except those who had "lands, tenements, fees, annuities or offices, to the yearly value of one hundred pounds" were prohibited from keeping or shooting "any cross-bow, hand-gun, hagbut or demi-hake" otherwise than in accordance with the *Act*. The question then arose in *Seint John's Case*[137] of whether the prohibition extended to a special bailiff, employed by a sheriff, who carried a hand-gun with him when he went to arrest a debtor on a *capias ad satisfaciendum*. The judges of the King's Bench answered "No" to the question in 1601, saying:[138]

> . . . that the carrying of this dagge was not prohibited by the said Act; for the sheriff, or any of his ministers, for the better execution of justice, may carry with them hand-guns, or other weapons,[139] invasive or defensive, and the same is not restrained by the general prohibition of the said Act.

In Canada today, as in England during the sixteenth century, there is legislation designed to curb the proliferating use of firearms. Sections 88 and 89 of the *Criminal Code*[140] render illegal and provide penalties for the possession of prohibited weapons under any circumstances, and for the possession of restricted weapons, including revolvers, when the person in possession has no registration certificate. Notwithstanding these provisions, a sheriff, deputy sheriff or sheriff's officer — as a peace officer[141] — can possess these kinds of weapons "for the purpose of his duties or employment."[142] Thus, in effect, the *Code* restates the principle of *Seint John's Case*.

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[131] *Ibid.* at 2-59.

[132] The deputy sits in the well of the courtroom near the judge and faces the accused person and the public gallery. The revolver stays in its holster until it is needed.

[133] Unless they are authorized by regulation or by permit, deputies are prohibited by the *Firearm Act*, R.S.B.C. 1979, c. 134, s. 12, from discharging, carrying or having in their possession "in or on a railway car, hand car or other vehicle on a railway, or in or on a motor vehicle, wagon, sleigh, aircraft, bicycle or other conveyance, a firearm containing live ammunition in its breech or in its magazine." Permits may be issued under Regulation 2 of the *Firearms [sic] Act Regulations*, B.C. Reg. 436/77.

[134] *Supra*, note 130 at 2-59.

[135] Of course the medieval sheriff had military duties: *see, e.g.*, Morris, *supra*, note 1 at 236-7, where the use of axes and the employment of archers is mentioned.

[136] 33 Hen. VIII, c. 6.

[137] (1601) 5 Co. Rep. 71b, 77 E.R. 162; *sub. nom. Gardener's Case*, (1601) Cro. Eliz. 822, 78 E.R. 1048.

[138] In *Gardener's Case*, *ibid.* at E.R. 1048, the report is slightly different: " . . . they all held it to be no offence, against the statute, for a sheriff or his ministers, in execution of justice, to carry such a hand-gun; for otherwise no justice would be administered: and in this case and for this purpose it is lawful."

[139] Here then is authority for use by the deputies of "batons." Batons are a kind of billy-club. The deputies are taught to use them as a "control instrument:" *see, e.g.*, R.K. Koga and J.G. Nelson, *The Koga Method: Police Baton Techniques* (1968) at 6. The Koga and Nelson book is used as a reference tool by the instructors at the "basic training" course. Use of batons by deputies is regulated by the instructions contained in Court Services Circular 4/81, 18 August 1981 and set out at pages 2-61 to 62 of the *Sheriff Services Operating Manual*. Those instructions include a direction that a " . . . baton may be issued to a Deputy Sheriff and carried when the Local Manager or a senior Deputy Sheriff authorized by the District Manager judges that there are circumstances that warrant this action." Nonetheless, at least one deputy sheriff in British Columbia carries his baton with him when he goes out to execute the courts' writs. For obvious reasons, that practice is objectionable.

[140] R.S.C. 1970, c. C-34.

[141] The subject of the sheriff as "peace officer" is discussed in Chapter V.

This discussion of arms should not be concluded without mentioning those enactments which govern the way in which firearms are to be handled.[143] Section 4 of the provincial *Firearm Act*[144] provides that: "A person who has a firearm in his possession or under his control shall exercise care for the safety of other persons or property." The offence for breaching the section is created by section 5 of the *Offence Act*.[145] The words "under his control" suggest that superiors could be found guilty by reason of acts of the deputies — so that while managers and senior deputy sheriffs who issue firearms may not be liable in tort because the maxim *respondeat superior* does not apply, they may nonetheless find themselves criminally responsible by statute for carelessness.

These superiors would not, however, be liable for breach by the deputies of provisions of the *Criminal Code*[146] designed to regulate the discharge of weapons.[147] There are two provisions. Section 84 (1) prohibits anyone who has no lawful excuse from pointing a loaded or unloaded firearm at another person. Section 84 (2) creates an offence where anyone without lawful excuse "uses, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons."

Some deputies have complained that the administrative regulations governing issuance of firearms are too strict. Others have said that no firearms should ever be issued. On the whole, and on the assumption that existing laws and internal rules will be enforced, there seems to be no reason to make recommendations concerning the use of arms.

E. Protection

Special status is given to sheriffs, deputy sheriffs and sheriff's officers by section 214 of the *Criminal Code*.[148] That provision classifies the offence of murder, and makes the murder of any of these people (and other officials who are listed[149]) first degree murder even if the killing is not planned and deliberate. It is undoubtedly thought that because anyone convicted of first degree murder must be sentenced to imprisonment for life without eligibility for parole until he has served 25 years of his sentence,[150] the likelihood of considered and impulsive attacks on sheriffs will be minimized. That belief is arguable, but this is not the place for that debate. It is enough to say that if some people are to be singled out for protection of this kind, then the sheriff and his deputies should be members of the group, if only because they are so closely connected with prisoners in the discharge of their escort responsibilities. There is less justification for the protection as far as other parts of the sheriff's work are concerned,[151] but there is no practical way of limiting the protection to take account of the different duties.

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[142] R.S.C. 1970, c. C-34, s. 90 (1).

[143] Of course, any negligence might attract a civil action in tort.

[144] R.S.B.C. 1979, c. 134.

[145] R.S.B.C. 1979, c. 305.

[146] R.S.C. 1970, c. C-34.

[147] Except, perhaps, as "parties" under s. 21 or as conspirators under s. 423 (1) (d).

[148] R.S.C. 1970, c. C-34. The protection is given to the sheriff, etc. *qua* sheriff, and not because he happens to be a "peace officer" under s. 2. At common law, it was murder to kill a sheriff: Co. Rep. 62b, 68a, 68b.

[149] Including police officers, prison wardens and prison guards.

[150] *See* the *Criminal Code*, R.S.C. 1970, c. C-34, s. 669. A person convicted of second degree murder is eligible for parole after serving 10 years of his sentence of life imprisonment unless the jury at his trial recommends that he serve "a number of years that is more than ten but not more than twenty-five:" *see* ss. 670 and 671 of the *Code*.

[151] "Fee-for-service" process servers are probably protected because they are appointed "as" sheriffs: *see* s. 2 (2) of the *Sheriff Act*, R.S.B.C. 1979, c. 386.

CHAPTER V THE CROWN OFFICER

The sheriff does some things because a court orders him to do so or could order him to do so if it was necessary. He does other things because a statute says that he is the one to execute court orders for which the statute makes provision. Because in each of these cases a court order is made in one way or another, the sheriff has special responsibilities. Those responsibilities are considered in Chapters VI and VII which deal with the sheriff as *Court* officer. In this chapter, attention is directed toward the sheriff as *Crown* officer. Here are discussed the duties which the sheriff must discharge by statute and with which the courts are not directly concerned.

A. A Few Words About the Common Law

In the thirteenth century, and undoubtedly earlier than that as well, the sheriff " . . . was in very fact the personal agent of the Crown within his county, and no limit could be put to the number of duties which he might be called upon to perform."[1] Today, it is only in rare cases that the Crown will call on the sheriff to do anything which an enactment does not specify that he should do. Thus, it is unlikely that the sheriff would be called on to enforce pollution control regulations[2] or to make an inquisition to uncover facts.[3] It is equally unlikely that he would be called on to "cry and publish" the closure of fairs,[4] to make proclamations,[5] to attend the Queen or her family during royal visits[6] (but why not?), or to defend the Province from invasion.[7] Yet these are all things which the sheriff did at common law and which, arguably, he could be called upon to do in this Province if the common law relating to sheriffs as Crown officers is applicable here.

Does it apply? The issue is one of the reception of English law into the Province, requiring close examination of five colonial laws. These are the *Order in Council* of 1856, which established a Supreme Court of Civil Justice in Vancouver's Island,[8] the *Sheriff's Act, 1860*, proclaimed for the mainland colony,[9] the *Sheriffs' Ordinance, 1867*, *The English Law Ordinance, 1867*[10] and *The Courts Declaratory Ordinance, 1868*.[11]

It can be said confidently that if there was a sheriff on Vancouver's Island before 4 April 1856 (no evidence that there was one has been uncovered) then the laws of England as they then were gave him his authority, defined his responsibilities, and governed his conduct. All that changed with the *Order in Council*. That order provided for the annual appointment of a sheriff, but arguably limited his responsibilities to those of a court officer by setting out explicitly what he was to do:

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[1] *Mather on Sheriff and Execution Law* (3rd ed., 1935) at 7.

[2] *See* W.A. Morris, *The Medieval English Sheriff to 1300*, (1927) at 217. In 1307, the sheriffs of Surrey and London were required to see that people who used kilns burned ". . . brushwood or charcoal and not sea coal, from the use of which an intolerable smell diffuse[d] itself."

[3] *Ibid.* at 212.

[4] *Ibid.* at 154, 216. *See also* the *Statute of Northampton* 2 Edw. III, c. XV (1328) *and see* C.H. Beaumont, *The Law Relating to Sheriffs and their Officers* (1968) at 105.

[5] *See* Crown Office (Commissions of the Peace and Royal Proclamations) Rules 1975, amending S.R.O. 1916, No. 550, made under the *Crown Office Act, 1877*, 40 & 41 Vict., c. 41, s. 3. *And see* Council of the Shrievalty Association, *Guide to the Office of High Sheriff* (1979) at 5 and J. Derriman, *Pageantry of the Law* (1955) at 113. *See also* the evidence of Charles Lennox Peel in the Minutes of Evidence accompanying the *Report from the Select Committee of the House of Lords on High Sheriffs*, Cmd. 257 (1888) at 12. In British Columbia, there is evidence that the sheriff of the colony of British Columbia made proclamations before union in 1858: *see* Box 1 of Proclamations, 1858–1918 (GR 549) in the Provincial Archives, at Victoria, which contains an original notice signed by "Joshua Attwood Reynolds Homer, High Sheriff of the Colony of British Columbia," showing that on 19 November 1866 he "publickly read published and proclaimed" a proclamation of "His Excellency Frederich Seymour Governor of the said Colony." Today the sheriff may still be required, under s. 7 of the *Canada Temperance Act*, R.S.C. 1970, c. T-5, when a notice is deposited with him, to post it for public examination.

[6] Shrievalty Association, *ibid.* at 5.

[7] *See* 36 *Atkin's Encyclopedia of Court Forms in Civil Proceedings* (1977) at 6 and Beaumont, *supra*, note 4 at 106.

[8] *Order in Council Establishing a Supreme Court of Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council* (4 April 1856). The Order in Council had its authority in *The Vancouver's Island Act*, 1849, 12 & 13 Vict., c. 48.

[9] Proclaimed 12 March 1860 at Victoria, Vancouver Island.

[10] Enacted 5 March 1867 and 6 March 1867 respectively.

[11] Enacted 1 May 1868.

> . . . to execute, all the sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands, and processes of the . . . Supreme Court and [to] make a return of the same, together with the manner of the execution thereof, to the . . . Court, and [to] receive and detain in prison all such persons as shall be committed to the custody of [the] sheriff, by the . . . Court, or by the Chief Justice thereof.

These were the only responsibilities mentioned in the *Order*. It is hard to say from the Order itself that it was not intended to be exhaustive, on both the question of appointment and on that of duties[12] and it may be that it was intended to define all that the sheriff could do on the Island.

It seems clear from the preamble to the *Sheriff's Act, 1860*, which was proclaimed in order "to alter the law relating to Sheriffs," that it was assumed that on the mainland the English law was in force.

When the Island and mainland colonies were united in 1866,[13] the *Sheriffs' Ordinance, 1867* was enacted to "assimilate" sheriff law "in all parts of British Columbia."[14] It repealed "The Sheriffs' Act, 1860"[15] and re-enacted its provisions for the new united colony. Section 4 of the *Ordinance* is worth mentioning. It provided that it would be lawful for every High Sheriff to hold his office until "supercession or resignation" and "to do and exercise all acts and authority which ought to be done or exercised by a Sheriff or Deputy Sheriff." This provision apparently did not affect the law relating to the sheriff as it existed before the *Ordinance* in the two colonies because what "ought to be done or exercised" was what ought to be done or exercised *at law*. Because nothing was said in the *Ordinance* about the *Order in Council*, the common law that existed before the *Order* remained the *law* for Vancouver Island — unless the *Order* was intended to be exhaustive — , subject to those minor modifications which the *Ordinance* introduced. For the mainland, the *law* was the recycled *Sheriff's Act, 1860*. In the result, it is doubtful whether the Ordinance effected an "assimilation" of the whole of sheriff law in the united colony.

The English Law Ordinance, 1867 was enacted the day following the *Sheriffs' Ordinance*. The preamble indicates that its purpose was " . . . to assimilate the Law establishing the date of the application of English Law to all parts of the [new] Colony of British Columbia." Section 2 provided:

> From and after the passing of this Ordinance, the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia. Provided, however, that in applying this Ordinance to that part of the Colony previous to the Union known as British Columbia, the said Civil and Criminal Laws as the same existed at the date aforesaid shall be held to be modified and altered by all past Legislation (of the said Colony of British Columbia before the Union, and of the Colony of British Columbia since the Union) affecting the said Colony of British Columbia as it existed before the Union.
>
> Provided, also, that in applying this Ordinance to that part of the Colony heretofore known as the Colony of Vancouver Island and its Dependencies, the said Civil and Criminal Laws as the same existed at the date aforesaid shall be held

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[12] The *Order* required the sheriff before he entered upon the office to "take an oath faithfully to execute the duties thereof." It is an open question whether "duties" was meant to include all the duties that an English sheriff had, or only those that were specifically listed later in the *Order*, and which are reprinted in the text.

[13] By the *British Columbia Act, 1866*, 29 & 30 Vict., c. 67.

[14] *See* the preamble to the *Sheriffs' Ordinance, 1867*.

[15] *Ibid*. s. 1.

> to be modified and altered by all past Legislation of the said Colony of Vancouver Island, and of the whole Colony of British Columbia since the Union, affecting the former Colony of Vancouver Island and its Dependencies.

This provision did not wash away the common law relating to the sheriff on the mainland or on the Island. On the mainland, all the English law (which was assumed to be applicable) was continued in force, except where it was "modified and altered" in minor ways by the *Sheriffs' Ordinance, 1867*. On the Island, "the Civil and Criminal Laws of England" relating to the sheriff were "received" but only to the extent that they had not been "modified and altered" by all past legislation. One piece of "past Legislation" was the *Order in Council*. That order — if it was exhaustive — significantly limited the sheriff's powers and duties.

Early in 1868, it became apparent that the *Sheriffs' Ordinance, 1867* had not achieved what had undoubtedly been intended. The result was *The Courts Declaratory Ordinance, 1868*. This new *Ordinance* produced an assimilation of sorts by ensuring in the two former colonies the reciprocal application of the *Order in Council* and of the *Sheriffs' Ordinance, 1867*. Sections 2 and 3 provided:

> 2. All the jurisdiction, powers, and authorities which before the passing of "The British Columbia Act, 1866," were by Law vested in and had and exerciseable by the Sheriff of Vancouver Island for the time being, in all matters, process, and proceedings, civil as well as criminal, and before all Courts in the said Island, under or by virtue of the Order in Council of the 4th day of April, A.D. 1856, shall be deemed and taken to have been and to continue during the pleasure of the Governor vested in the High Sheriff for the time being of the United Colony of British Columbia, as and from the 19th day of November, A.D. 1866.
>
> 3. The provisions of the "Sheriffs' Ordinance, 1867," shall be deemed and taken to extend and apply, and to have extended and applied, to that part of British Columbia heretofore known as the Colony of Vancouver Island and its Dependencies, as and from the passing of such Ordinance.

Thus, the legislation was assimilated. The *Order in Council* applied on the mainland; the *Ordinance* on the Island. But there was still no assimilation of the common law powers and responsibilities which the mainland sheriff enjoyed and discharged.

In the result, it seems that the new colony "received" the English law relating to the sheriff in different ways in its constituent parts. Vancouver Island took the law subject to the limitations of the *Order in Council*, the mainland took the full range of authorities and duties.

Both the *Sheriff's Ordinance, 1867* and sections 2 and 3 of *The Courts Declaratory Ordinance, 1868* were repealed in 1873,[16] but the repealing statute did not affect existing common law powers.

The conclusion to be drawn from this analysis is that on the mainland[17] the sheriff may still have common law powers and duties as a Crown officer which he does not have on Vancouver Island. That is an odd thing, especially when it is noted that section 4 of the current *Sheriff Act*,[18] gives the director and each sheriff " . . . jurisdiction throughout the Province to exercise all the powers and perform all the duties imposed on him under this or any other enactment." Of course, that provision does not grant common law powers or impose common law duties which did not already exist.

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[16] *Sheriffs Act*, S.B.C. 1873, No. 7, s. 3.

[17] "Mainland" here includes the Stikeen territories. They were annexed to the Colony of British Columbia by an *Order in Council* dated 19 July 1862. Because there was no legislation governing the territories until that year and because they were "settled lands," the laws of England would have applied. Thus, all the duties of the sheriff were imported. For a history of reception in British Columbia, *see* J.S. Marshall, *The Reception of English Law as a Modern Legal Problem* (1977) at 1-18.

[18] R.S.B.C. 1979, c. 386.

This state of affairs may make little practical difference, but it is fertile ground for those who profess an interest in the logic of the law. Obviously something should be done to correct the problem, if a problem it be. The simplest solution lies in listing the sheriff's authorities and duties exhaustively in a statute.

B. Statutory Duties[19]

Some statutes direct the sheriff to do things by naming him expressly as the person to do them. Some say that he must act but that others may act as well. Some say that things are to be done by peace officers, and sometimes the sheriff does them in that capacity. Other statutes say that someone should act, but authorize that person to use an agent, and sometimes the sheriff is the person chosen by principal. This section of the paper comprises a discussion of all these classes of statute.

Chapter III contains a short, general discussion of the broad constitutional question touching appointment of the sheriff. There seem to be no constitutional problems as far as provincial statutory Crown duties are concerned — with the single exception of the duties imposed by the *Expropriation Act*.[20] That enactment can be put to the side for the moment.[21] For all the other statutes, it seems clear that provincial authority for imposing Crown duties on the sheriff can be derived from heads 13 and 16 of section 92 of the *Constitution Act, 1867*.[22] What may not be caught by one head is almost certainly caught by the other.

1. PROVINCIAL LEGISLATION

(a) The Duty to Give Aid and Assistance

Where allegations have been made that "corrupt practices have extensively prevailed" at an election of members to the Legislative Assembly for the Province, the Lieutenant Governor in Council may, under the *Election Act*,[23] appoint commissioners to make an inquiry. These commissioners have broad powers, including the same power to cite for contempt which judges of the Supreme Court of the Province have.[24] They also have the right, by section 280 of the *Act*, to the help of the sheriff. The important part of the provision is this: "All jailers, sheriffs, constables, bailiffs and all other police officers[25] shall give their aid and assistance to the commissioners in the execution of their office." The same duty is imposed on the sheriff by section 198 of the *Inquiry Act*,[26] where commissioners have been appointed for the particular purposes of that legislation. The *Utilities Commission Act*[27] contains a similar, but not identical, provision in section 109, which reads: "A sheriff, deputy sheriff or peace officer is an officer of the commission and shall, when requested, aid, assist and obey the commission in the exercise of its jurisdiction." All three provisions seem to require the same thing, but an argument could be made that a sheriff must be prepared to act on his own initiative under the first two statutes and need only be responsive under the third.

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[19] There are several "mixed" responsibilities where the sheriff must juggle his Crown and court duties: *see*, *e.g.*, the discussion of escort work in Chapter VIII.

[20] R.S.B.C. 1979, c. 117, ss. 38–55 and s. 87.

[21] Major reform of this statute seems likely in the near future. *See* text *infra* at n. 90.

[22] 30 & 31 Vict., c. 3.

[23] R.S.B.C. 1979, c. 103, s. 267.

[24] *Ibid.* s. 280.

[25] The use of the word "other" in this section is regrettable. It should be removed because its presence suggests that sheriffs are police officers. They are not and never have been: *see* the discussion of the powers of a constable later in this Chapter.

[26] R.S.B.C. 1979, c. 198.

[27] S.B.C. 1980, c. 60.

It is not clear what responsibilities the sheriff is being required by these provisions to bear. One might assume, however, that by analogy to the courts (an analogy which the Legislature seems to present) the sheriff is to do all those things he must do as an officer of the court.[28] If it is proper to draw the analogy, then the sheriff must attend on the commissioners generally; he must act as their orderly, protect them as they travel to and from hearings, guard witnesses, and members of the public, arrest alleged contemnors,[29] and enforce any order which the commissioners may make.

If some officer should be available to do these kinds of things, then the sheriff, for historical and practical reasons, seems properly suited to do them. But the points to be made are that little use in practice is made of the sheriff under these provisions and that others could do the work just as well. It seems that the power to call on the sheriff is a forgotten, if not unnecessary, one, except in those cases where judges, who know how useful an attendant can be, are appointed as commissioners under the *Inquiry Act*.[30]

If there is no useful job that can be done by the sheriff under the *Election Act*[31] or under the *Utilities Commission Act*,[32] then the provisions requiring the sheriff to act might be repealed. If there is work to do, and if it is decided that the sheriff should do it, then each of the provisions under discussion should be re-drafted to spell out clearly the kinds of things the officer is expected to do when giving aid and assistance and the kind of assistance, if any, he in turn can summon.[33] This need not be difficult. It is easy, for instance, to provide that the sheriff is to act as "officer" so far as the commissioners are permitted to act as "court."

(b) The Duty to Seize

Under the *Land Act*[34] and under the *Repairers Lien Act*,[35] the sheriff can be called upon to seize personalty without the necessity for anyone first obtaining an order from a court to authorize the seizure. Section 57 (1) of the *Land Act*[36] provides that where anyone has trespassed on Crown land — the most likely candidate would be a "gyppo" logging contractor — the responsible minister may:

> "(d) direct a regional land manager or a sheriff to seize on the minister's behalf all improvements, logs, machinery, equipment, goods, chattels or other materials on the Crown land or in or on water on the land . . . "

By section 57 (4) of the Act, anything seized under that authority becomes the property of the Crown.

Enquiries of the sheriff's local offices, which prompted responses from the Interior, the North Coast and the Peace River areas of the Province, show that no recent use has been made of the sheriff under the provision. From this information, one might conclude that trespass is uncommon or that, where circumstances would permit the minister to act, he prefers to choose a "regional land manager" to make the seizure, probably because that official is more directly under the minister's control. In either case, there is no reason to involve the sheriff, so the reference to him should be deleted from the provision.

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[28] The responsibilities of the sheriff as an officer of the court are discussed in Chapter VI.

[29] Commissioners appointed under the *Inquiry Act*, R.S.B.C. 1979, c. 198 are given the power to cite for contempt by s. 16 of the *Act*.

[30] Sheriffs were in attendance at the request of the commissioner, the Honourable Mr. Justice Seaton, during the proceedings of the provincial Commission of Inquiry pursuant to Order-in-Council #1885, 5 July 1979.

[31] R.S.B.C. 1979, c. 103.

[32] S.B.C. 1980, c. 60.

[33] This question is discussed in Chapter VII, in the context of the sheriff's duty to enforce court orders.

[34] R.S.B.C. 1979, c. 214.

[35] R.S.B.C. 1979, c. 363.

[36] *Supra*, n. 34.

In any event, the way in which the direction to act is phrased raises difficulties. It is not clear what powers the sheriff could exercise, or would have to exercise, were he called upon to seize. If he remains as an official to whom a direction may be issued, then attention should be given to the question of his powers. For instance, is the sheriff to be limited to the powers he would have if he were executing one of the writs for which provision is made by Rule 42 of the Rules of Court,[37] or is he to have the broader power to break open? Equally, what assistance could the sheriff take with him in order to make a seizure and who, if anyone, could he call upon for help if he thought he needed it?

The same questions and others can be asked about the sheriff's responsibility under section 9 (1) of the *Repairers Lien Act*.[38] The Act entitles a garage keeper to claim a non-possessory lien over listed things which he has repaired where he has not been paid for the work he has done. He may then file an affidavit of claim of lien under the Act and the filing has the effect of continuing the lien for 180 days.[39] During the subsistence of the lien, the garage keeper may issue a warrant to a bailiff licensed under the *Debt Collection Act*[40] or to "the sheriff of the county or district in which the . . . [thing] . . . subject to the lien is for the time being."[41] The warrant (there is no statutory form) directs and the provision imposes on the bailiff or sheriff a duty, where the fees provided by the Act have been paid,[42] to seize the thing within 180 days of the date of the filing of the lien and to return the thing to the garage keeper. The question of what powers may be exercised in making the seizure is left open.

It is also not clear to what extent, if at all, the bailiff or sheriff can remain in possession of the thing on the premises where it is found before he delivers it to the garage keeper as the warrant directs. This is a significant deficiency in the legislation. It may not, for instance, be possible for the sheriff to move an aeroplane immediately. It may be necessary for him to stay with it for a time while he arranges for transportation, but his presence could disrupt lawful activities on the debtor's premises or on the premises of a stranger for so long as he is there. The Act should provide specifically that the bailiff or sheriff can remain where the thing is found for a reasonable time so that the necessary haulage arrangements can be made. This right might be implied from the legislation, but it would be preferable to clarify the point through an appropriate amendment.

The legislation seems only to contemplate that the person who seizes is to do nothing more than to deliver the thing he has seized to the garage keeper who claims the lien. This limited responsibility is apparently not so clear to some in the Province. For example, it was learned from the local manager of sheriff services in Campbell River that his office had been asked by a lawyer, purportedly under section 9 of the Act, to try to collect the money owed to the garage keeper and to seize a boat only if collection efforts failed. The request was rejected. In June 1980 the director of sheriff services had distributed a Court Services Circular[43] which stated: "The Sheriff should not act as agent for the garage keeper by selling the chattel, but should deliver the chattel to the garage keeper as authorized by section 9 (1)." This statement accords with the better view of the extent of the sheriff's duty and serves to emphasize that under the *Act* the sheriff is not engaged in the process of execution. His responsibility is a much more limited one.

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[37] *See, e.g., Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 71 (5) for an idea about how the powers could be given.

[38] R.S.B.C. 1979, c. 363.

[39] *Ibid.* s. 7.

[40] R.S.B.C. 1979, c. 88.

[41] The reference to "the sheriff of the county or district" is of course no longer necessary in light of s. 4 of the *Sheriff Act*. A number of other provisions are obsolete for the same reason and should be repealed or amended: *County Boundary Act*, R.S.B.C. 1979, c. 71, s. 4, *County Court Act*, R.S.B.C. 1979, c. 72, s. 20, *Income Tax Act*, R.S.B.C. 1979, c. 190, s. 36, *Jury Act*, R.S.B.C. 1979, c. 210, ss. 8, 9, 10 (2), *Woodworker Lien Act*, R.S.B.C. 1979, c. 436, s. 14 (2), and the *Vancouver Charter*, S.B.C. 1953, c. 55, s. 539; this last provision contemplates the issuance of a warrant to "the sheriff of the County of Vancouver." A judge, however, should have no trouble issuing the warrant under that section to *any* sheriff or deputy: *see Barre* v. *McManus*, [1947] 1 W.W.R. 263 (B.C.C.A.), where the court did what was sensible in the circumstances. Finally, Form 1 of the Schedule to the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54 should be changed to say "To the Sheriff" rather than "To the Sheriff for . . . ."

[42] R.S.B.C. 1979, c. 363, s. 9 (2).

Inevitably, where a statute provides that either one of two or more persons may act, a question arises: is it necessary that the power be granted to more than one? So far as the *Repairers Lien Act* is concerned it seems desirable that the alternative of bailiff or sheriff be available. There is no reason for limiting the work to the sheriff where bailiffs can do a proper job for the same price or less. Thus, as long as bailiffs are available, they should be left to do the work and the sheriff should no longer be involved, even though some use of him is now made.

It should be mentioned that in some places, because of the pressure of other work, the sheriff finds it necessary, when he has received a warrant under the Act, to transmit it to a bailiff for action. This procedure is convenient if he is understaffed. There is little reason that he should not continue to do so, if it is thought that he should continue to do the work at all, but only with the concurrence of the garage keeper. He cannot otherwise avoid a clear statutory duty and an application under section 2 (2) of the *Judicial Review Procedure Act*[44] for an order in the nature of *mandamus*, compelling the sheriff to act, might lie if he insisted on passing the warrant into private hands where the garage keeper did not want a bailiff to do the work. The same remedy might be available to a garage keeper who had initially permitted the sheriff to refer the work, but who later became dissatisfied with the bailiff's conduct and again required the sheriff to make the seizure.

Where bailiffs are not available, provision could be made enabling a garage keeper to apply to court for an order directing the sheriff to act.

(c) The Duty to Levy

Section 35 of the *Taxation (Rural Area) Act*[45] provides that a collector appointed under the Act, or "a sheriff as his agent," may by distress levy taxes due to the Crown. The section is quite commonly used. In practice, a collector issues a "Warrant to Distrain"[46] to a sheriff, whom he describes in the warrant as "my agent." No provision is made by the statute for conversion of the warrant into a court order by filing it in a court registry or for enforcing it as a court order. It is a purely administrative remedy.

There is no reason why bailiffs could not be used to do this work. And so it is recommended that they or some other Crown officer replace the sheriff to perform this task.

The sheriff is authorized and required under the warrant:[47]

> . . . to distrain the goods and chattels or personal property of [X] or of any goods and chattels or personal property in his possession, wherever the same may be

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[43] Court Services Circular No. 4/80, 26 June 1980. *See also* page 5-69 of the *Sheriff Services Operating Manual*.

[44] R.S.B.C. 1979, c. 209.

[45] R.S.B.C. 1979, c. 400.

[46] The *Act* does not make provision for a particular form of Warrant to Distrain. A statutory form may be desirable.

[47] The form of warrant used by the Real Property Taxation Branch of the Ministry of Finance is coded TX 138-M-1277-5166.

> found within the Province, or of any goods and chattels or personal property found on the premises, the property of or in the possession of any other occupant of the premises, for [$Y], being taxes due to Her Majesty."

In its Report on Distress for Rent and Other Debts, the Law Reform Commission adopted the following definition:[48]

> A distress is the taking of a personal chattel, without legal process, from the possession of a wrongdoer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand.

At common law, "the party grieved" had no right to sell the goods he seized.[49] He held them on a basis akin to ransom. But commonly a right of sale is given by statute[50] and that is the case with the *Taxation (Rural Area) Act*. In fact, the collector has a *duty* to sell, for the discharge of which he may employ "his agent."[51]

In practice, the deputy sheriffs treat the warrants to distrain in much the same way they treat writs of seizure and sale and other writs of execution. There is probably nothing wrong with that. But there are important differences to notice.

First, it is arguable that a deputy executing a warrant to distrain has a power to search the debtor's person for goods which can be seized. It is a power which he does not have under a writ of execution,[52] but which he may have under section 35 of the Act. In paragraph (a) the words "the personal property liable to pay the taxes" are followed by "or personal property in his possession." The same point arises with respect to personal property in the possession of "occupants" in paragraph (b). A power to search the person of a debtor is undesirable and if section 35 is to remain in force[53] it should be amended to make it clear that the debtor's person and the person of any occupant are inviolate.

The second difference is that a much broader class of property can be seized under the warrant than could be seized under a writ. The warrant authorizes the sheriff to seize not only the personal property of the defaulting taxpayer but also *any* property which may be found in the debtor's possession or on his premises, no matter who the owner may be. A power of that breadth is not surprising in a taxing statute and it means that a recurring problem for deputies acting under writs of execution is eliminated. That is the problem of deciding just what goods a debtor owns amongst those that are found in places where goods of the debtor are likely to be. The possibility of liability for wrongful seizure is much reduced. In any event, the sheriff could apply for relief by way of interpleader where a claim to property is made. That is what subsection (5) seems to suggest by its reference to the determination of a claim "by action at law or otherwise." But it also appears that even if a claim is made, the collector can proceed to sale. In fact, subsection (2) suggests that he has a duty to do so. Following sale, he must distribute the surplus if he admits a claim, or retain it pending resolution of the issue of ownership.

Third, there is the question of the right of the collector or sheriff to enter the premises of the taxpayer. Because the levy for which provision is made by the section is by "distress," the rules permitting entry for distress apply. For the most part, the rules are similar to those for entry on an execution, but they are not identical.

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[48] Law Reform Commission of British Columbia, *Report on Distress for Rent* (LRC 53, 1981) at 7. (In the Report the Commission recommended that the "distress" provisions of the *Taxation (Rural Area) Act* be repealed.)

[49] *Ibid.* at 11.

[50] *See, e.g., Rent Distress Act*, R.S.B.C. 1979, c. 362, s. 8.

[51] S. 35 (2).

[52] *See* the discussion of the subject in Chapter VII at note 109.

[53] Its repeal has been recommended. *See* n. 48 *supra*.

The fourth point. Under the warrant to distrain, the deputies are led to believe that they are justified in seizing everything they find, because the form of warrant used today[54] purports to "authorize and require" the sheriff to seize things which the statute declares to be exempt. By paragraph (b) of section 35 of the Act, only that personalty "which would be subject to distress for arrears of rent due to a landlord" can be seized from an occupant of the debtor's premises. Section 2 of the *Rent Distress Act*,[55] sets out certain statutory exemptions from distress:

> (1) The following personal property is not liable to seizure by distress for rent or penalty:
> (a) the beds, bedding and bedsteads, including cradles and carriages in ordinary use by the debtor and his family;
> (b) the necessary and ordinary wearing apparel of the debtor and his family;
> (c) one cooking stove with pipe and furnishings, one other heating stove with pipe, one set of cooking utensils, one lamp, one table, one washstand with furnishings, 6 towels, one clock, one broom, 2 pails, one axe, one saw, one shovel, one washtub, one washboard, 3 smoothing irons, one sewing machine and attachments in domestic use;
> (d) for the debtor and for each member of his family, one chair, one plate, one cup and saucer, one knife, one fork, one spoon;
> (e) all necessary fuel, meat, fish, flour and vegetables for the ordinary consumption of the debtor and his family for 30 days;
> (f) tools and implements of or personal property ordinarily used in the debtor's trade or occupation, to the value of $200.
>
> (2) The debtor may select from the tools, implements or personal property referred to in subsection (1) (f) the things which are exempted from seizure under that paragraph.

The point to be made is that the statute, and the form of warrant that is used, say different things. The sheriff is required by statute to act as the collector's agent when called on to do so and must heed the collector's directions. Those directions are formulated in a way which exposes the sheriff to liability, because the warrant is misleading. The idea of a warrant is a good one, but the language of the direction should correspond with the language of the enabling legislation.

The collector has the power to sell the property distrained. Subsection 3 of section 35 of the *Taxation (Rural Area) Act* provides that any surplus remaining after sale "be paid to the person in whose possession the property was when the distress was made." These words seem to provide only a means of distributing any surplus, but do not relieve the collector or his agent from the responsibility not to seize too much. Thus, in the right circumstances, a sheriff may be liable for excessive distress.

(d) The Writ of Extent

On first blush, section 200 of the *Land Title Act*[56] seems to be a curious provision:

> WRIT OF EXTENT, ETC.
> (1) A sheriff, after delivery to him of a writ affecting land may, on behalf of the Crown for the purpose of enforcing or recovery of a debt due to the Crown, apply to register, in the same manner as a charge is registered, a copy of the writ against the title to the land registered in the name of the debtor.
> (2) The copy of the writ referred to in subsection (1) must be certified as a true copy by the sheriff or the registrar of the issuing court.

The "writ affecting land" to which reference is made is undoubtedly the writ of extent. That conclusion arises from the "head note" of the provision, to which a court may look for "convenience of reference,"[57] and because writs of *elegit* and of *fieri facias de terris* — other writs affecting land — are abolished by section 73 of the *Court Order Enforcement Act*.[58]

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[54] *Supra*, note 47.

[55] R.S.B.C. 1979, c. 362.

[56] R.S.B.C. 1979, c. 219.

The ability to apply to register the writ raises two points. The first relates to the way in which the application for registration is to be made. The procedure is set out in sections 144-148 of the *Land Title Act*.[59] In short, the sheriff must make application in writing,[60] and the application must be in or include one of the "prescribed" forms.[61] He must deliver to the registrar of land titles a memorandum in writing containing an address to which notices under the Act may be mailed;[62] he must, at the request of the registrar, supply the given names, surname, address and occupation of the parties mentioned in the writ;[63] and he must make a declaration of citizenship,[64] although it seems that this last requirement need only be satisfied where he applies to register a writ of immediate extent. That is a writ of extent which is not founded on a judgment.[65] Where the writ is an ordinary writ of extent, the sheriff may also be required by the registrar to produce or deposit the judgment.[66]

The second point concerns subsection (2) of section 200. As it now stands, the provision suggests that a sheriff will be in a position to certify the accuracy of any writ which comes to him. Of course, he will not be able to do that unless the writ he is asked to certify is itself certified by the court registrar to be a true copy. This is so because the registrar, not the sheriff, issues the document on the court's behalf. It seems to be unnecessary to have two certifying agents. The reference to the sheriff in the subsection should be removed. Indeed, it would be better to provide in the legislation that some other Crown officer make the application. The work to be done is not work for which the sheriff can claim any expertise which would demand that he do it.

(e) The Sheriff as "Receiver"

Where property has been distrained for rent due, the landlord may sell it. If the sale generates a surplus, it is to be paid to the sheriff. Section 8 (2) of the *Rent Distress Act*,[67] provides:

> After appraisal the person distraining may sell the property distrained, the sale proceeds to satisfy the rent in arrears, the charges of distress, appraisement and sale; leaving the surplus, if any, in the hands of the sheriff for the owner's use.

It is not clear whether this provision makes the sheriff a trustee of any money that is paid to him. It might,[68] and if it does, then he must discharge the duties which all trustees must discharge, including the duty in the right circumstances to invest the trust property. If the sheriff is not a trustee, then he undoubtedly owes at least a fiduciary duty to the person entitled to the money.

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[57] *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 11.

[58] R.S.B.C. 1979, c. 75.

[59] R.S.B.C. 197, c. 219.

[60] *Ibid*. s. 145.

[61] *Ibid*. *See also* s. 154, which provides in part:

> (1) Where an application is made in the appropriate prescribed form, the form shall appear on the first page at least 1½ inches from the top of the instrument tendered for registration unless the registrar allows the form to appear elsewhere, and shall be signed by the applicant or his solicitor or authorized agent.
>
> (2) Where no instrument is required to be produced in support of an application under section 151 or 152, the prescribed form may be included in a letter or other document satisfactory to the registrar

[62] *Ibid*. s. 146.

[63] *Ibid*. s. 147.

[64] *Ibid*. s. 148.

[65] *See The King* v. *Sansoucy*, [1948] 3 D.L.R. 821 (Ex.), *per* Thorson P. at 823. The citizenship declaration is required of applicants who claim a "charge on land, other than a mortgage or a money judgment."

[66] *Ibid*. s. 156.

[67] R.S.B.C. 1979, c. 362.

[68] *See*, *generally*, D.W.M. Waters, *Law of Trusts in Canada* (1974) chap. 19. If the sheriff is a trustee, then it is always open to him to apply to court for directions: *see Re Londonderry's Settlement*, [1965] Ch. 918

There is nothing in section 8 (2) specifying how the owner is to get the money from the sheriff or whether the sheriff must act at a particular time to get it to the owner. What proofs of ownership must the sheriff accept before disbursing? What does the sheriff do when he cannot find the owner? What duty, if any, does he have to locate him? And what happens in the interim if the value of money goes down? These questions are not unimportant ones; nor is the broader question of just who in sheriff services owes the duty. Is it the Crown, because the sheriff is public servant? Or is it one of the officials in the hierarchy from director down? If so, which one?

There is a broader question as well: why should the sheriff do this work at all? Professional trustees would be much better suited. Their fees could be regulated.

If the recommendations of the Law Reform Commission in relation to distress for rent[69] are accepted, then the sheriff will no longer have a role in dealing with a surplus. If, however, they are not accepted and the sheriff continues to receive the surplus, something must be done to define the nature of his position at law in receiving it.[70]

(f) *The Duty to Judge*

Until 1965, England had legislation which required the sheriff to preside over what was popularly called the "Compensation Court."[71] That court is not to be confused with the sheriff's *torne*[72] or with the County Court,[73] for each of which the sheriff had assumed responsibility when that "kingdom was divided into counties."[74] Both the *torne* and the County Court were, "at common law, incident and inseparable from the office of Sheriff."[75] The "Compensation Court" was something different. Atkinson said that it was "unknown to the common law."[76] It sprang from a need to provide a fair means of assessing the compensation to which landowners were entitled when their lands were acquired by compulsion "for undertakings or works of a public nature."[77] Before 1845, there were in England a number of statutes which gave certain public companies — for example, railway[78] and river navigation[79] companies — the right to take privately owned land where it was required for their undertakings, and which provided that in the right circumstances certain officials, including the sheriff, should summon a jury to assess the compensation to which the landowner was entitled.[80] These various statutes were consolidated in 1845 with the enactment of *The Companies Clauses Consolidation Act, 1845*,[81] The Lands Clauses Consolidation Act, 1845,[82] and *The Railways Clauses Consolidation Act, 1845*.[83] For present purposes, only *The Lands Clauses Consolidation Act, 1845* is important. That Act is important because it was a model for legislation enacted for Vancouver Island in 1863[84] and for the united Province (albeit belatedly) in 1897,[85] and because many of its provisions are still the law in British Columbia,[86] despite its repeal in England in 1965.[87]

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[69] Law Reform Commission of British Columbia, *Report on Distress for Rent* (LRC 53, 1981).

[70] It is probably not necessary that he be a trustee, so long as sheriffs are public servants and so long as public servants have a duty to account for money that comes into their hands. This problem might be solved by repealing the last phrase of section 8 (2) and replacing it with these words:

> leaving the surplus, if any, with an employee of sheriff services who shall forthwith pay the surplus, or cause it to be paid, to the tenant or owner, as the case may be, on production of evidence of entitlement satisfactory to the employee or to any employee of sheriff services, and no employee of sheriff services shall on any account be responsible for the surplus as a trustee.

If necessary, the Crown could be sued by the owner or tenant if the money was not paid when a claim for it was made. It might be necessary as well to define "sheriff services" in the *Interpretation Act*, R.S.B.C 1979, c. 206. There is now no definition, even though the description is used in ss. 1, 2 (1) and 3 (1) of the *Sheriff Act*, R.S.B.C. 1979, c. 386. The following definition might be added to s. 29 of the *Interpretation Act*: "sheriff services" means that department of the Court Services Division of the Ministry of Attorney General to which the Attorney General has assigned responsibility for the discharge of the duties of the sheriff in the Province." It is another question whether "Court Services Division" should also be defined.

[71] *See, e.g.*, G. Atkinson, *Sheriff-Law* (3rd ed., 1854) at 81; C. Churchill, *The Law of the Office and Duties of the Sheriff* (2nd ed., 1882) at 110; and P.E. Mather, *A Compendium of Sheriff Law* (1894) at 418.

[72] There is a brief but good description of the demise of the sheriff's *torne* in W.H. Watson, *A Practical Treatise on the Office of Sheriff* (2nd ed., 1848) at 399–401.

[73] Atkinson, *supra*, note 71 at 34, said that the sheriff's duties in the County Court ". . . are, in general, of a ministerial, and not of a judicial nature. He is the *Registrar* of the Suitors or freeholders, who are the real *Judges* there." Watson, *supra*, note 72 at 403, agreed, but added: "Although the suitors be judges in the county court, the judgments and writs, and all other acts in that court, are in the name of the sheriff." That may explain what was said in the Preface to J. Impey, *The Office of Sheriff* (1786): "As a *judicial officer*, the sheriff has the administration of justice in the county-court . . . ."

[74] Watson, *supra*, note 72 at 399.

[75] Atkinson, *supra*, note 71 at 34. *See also* Impey, *supra*, note 73 at 224.

[76] *Ibid.* at 82.

[77] *Ibid.*

[78] *See, e.g.*, *Taylor* v. *Clemson*, (1844) 11 Cl. & F. 610, 8 E.R. 1233 (H.L.).

[79] *See, e.g.*, *The King* v. *The Justices of the West Riding of Yorkshire*, (1834) 3 N. & M. 93 (K.B.).

Provisions from the 1845 Act are now found in the provincial *Expropriation Act*,[88] the new title given to the *Lands Clauses Act*,[89] in which the provisions have been entombed since the 19th century. "Entombed" is the proper word because no one in sheriff services can remember the last time the sheriff was called on to act under the provisions. That fact alone suggests that it would be appropriate to relieve the sheriff of the responsibilities which the statute imposes.

It is likely that, in due course, new expropriation legislation will be enacted based on the recommendations made by the Law Reform Commission in 1971.[90] Under such legislation, the sheriff would have no role in compensation proceedings. The analysis which follows is included for the purpose of throwing some light on the present state of the law and for the purpose of underscoring the unsuitability of the sheriff for the work.

As a preliminary point, it should be noted that the sheriff is no longer the appropriate person to preside. Deputies in this Province do not have sufficient training to enable them to perform what may be a difficult judicial function. It is no surprise that the English legislation specifically provided[91] that the under-sheriff (who was almost always legally trained) could act in the sheriff's stead, and the authorities indicate that he participated frequently.[92]

Does the Province have the constitutional authority to appoint the sheriff to act as the *Expropriation Act* requires him to act? The full text of the relevant provisions of the Act is reproduced later in this section. To summarize, the provisions require the sheriff to summon jurors,[93] to select a jury,[94] to preside on an inquiry,[95] to summon witnesses when asked to do so,[96] and "to give judgment for the compensation assessed by the jury."[97] Can a Province provide for an inquiry of the kind which the Act contemplates and over which the sheriff is to preside and ultimately "give judgment?" The problem lies with section 96 of the *Constitution Act, 1867*.[98] It reserves to the Governor General of Canada the power to appoint "the Judges of the Superior, District and County Courts in each Province." In the *John East* case,[99] the constitutional questions were held to be: does the provincial body under challenge exercise a "judicial power;" and if so, is it a superior, district or county court or a tribunal analogous thereto?[100]

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[80] It is no surprise that the sheriff was one of the people chosen to preside over the hearings. He had been a judge of one kind or another for centuries and by then, far from being a tyrannical royal officer, was often a prominent and respected county official.

[81] 8 & 9 Vict., c. 16.

[82] 8 & 9 Vict., c. 18.

[83] 8 & 9 Vict., c. 20.

[84] *Vancouver Island Land Clauses Consolidation Act, 1863*, R.S.B.C. 1871, No. 13.

[85] *Lands Clauses Consolidation Act, 1897*, R.S.B.C. 1897, c. 112.

[86] *Expropriation Act*, R.S.B.C. 1979, c. 117, ss. 38–54. *And see* s. 2 generally for application of the *Act*.

[87] *Compulsory Purchase Act, 1965*, 13 & 14 Eliz. II, c. 56, Schedule B, Part III. In 1960, it was said in 34 Hals. (3rd), para. 1193: "The practice of assessing compensation by a sheriff and jury under the Lands Clauses Acts is obsolescent." There is evidence of the obsolescence of the practice here too: The Law Reform Commission of British Columbia did not discuss the sheriff's compensation hearings in the *Report on Expropriation* (1971); nor did E.C.E. Todd in *The Law of Expropriation and Compensation in Canada* (1976).

[88] R.S.B.C. 1979, c. 117, ss. 38–54.

[89] R.S.B.C. 1960, c. 209, ss. 40–54, *as am.* S.B.C. 1977, c. 53, s. 1.

[90] Law Reform Commission of British Columbia, *Report on Expropriation* (LRC 5, 1971). *See also*, *Discussion Proposal for a New Expropriation Act*, Ministry of Intergovernmental Relations (1982) ("Green Paper on Expropriation").

[91] *The Lands Clauses Consolidation Act, 1845*, 8 & 9 Vict., c. 18, s. III, where "Sheriff" is defined to include "Under Sheriff."

[92] *See, e.g.*, *Manning* v. *The Eastern Counties Railway Company*, (1843) 12 M. & W. 237, 152 E.R. 1185 at 1188 (Ex.) and *Regina* v. *The Eastern Counties Railway Company*, (1843) 2 Dowl. N.S. 945 (Q.B.); but *see Chabot* v. *Viscount Morpeth* (1844) 15 Q.B. 446, 117 E.R. 528, from which it is apparent that Joseph Bonsor, Esq., Sheriff of Surrey, presided himself. In England, the *Lands Tribunal Act*, 1949, 12, 13 & 14 Geo., c. 42 superseded the ancient compensation court and now a barrister of at least 7 years standing chairs a board whose task it is to assess land value.

What is a "judicial power?" The answer given by the Judicial Committee of the Privy Council in *Shell Co. of Australia* v. *Federal Commissioner of Taxation* was this:[101]

> Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in *Huddart, Parker & Co.* v. *Moorehead* (1), where he says: "I am of opinion that the words 'judicial power' as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

On "controversies," there is doubtless a *lis* to be determined when the provisions of the *Expropriation Act* are called into operation. "Promoters"[102] want the land; the landowner, resigned as he must be to the loss of his property, wants adequate compensation. Thus, section 38 provides that the promoters can issue a warrant to the sheriff requiring him to summon a jury where "a question of disputed compensation is required to be determined." The same section is designed to produce a fair inquiry by providing that someone other than the sheriff shall preside where "the sheriff is interested in the matter in dispute." The sheriff is to "preside on the inquiry" in all other cases.[103] Moreover, "the party claiming compensation is the plaintiff, and has all the rights and privileges a plaintiff is entitled to in a trial at law."[104] There is provision as well for the sheriff to summon witnesses and to order a view[105] and for the jury to "swear an oath that they will truly and faithfully inquire and assess the compensation for which their verdict is to be given."[106]

On a "binding and authoritative decision," section 49 provides that the sheriff:

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[93] S. 40.

[94] S. 41.

[95] S. 42.

[96] *Ibid.*

[97] S. 49.

[98] 30 & 31 Vict., c. 3.

[99] *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Limited*, [1949] A.C. 134 (P.C.). For a recent analysis of the *John East* test, *see Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714; (1981) 123 D.L.R. (3d) 554.

[100] *Ibid.* at 145, *per* Lord Simonds.

[101] [1931] A.C. 275, 295.

[102] "Promoters" is defined in s. 1 of the *Expropriation Act* to include " 'promoters of the undertaking' and means the parties, whether company, undertakers, commissioners, trustees, corporations or private persons, by the special Act empowered to execute works or undertakings." The "special Act" is defined in s. 1 to mean "any Act to which *The Lands Clauses Consolidation Act, 1845* (United Kingdom) applied on May 8, 1897, and any Act passed after that date which authorizes the taking of land for the undertaking to which the same relates, and with which this Act is incorporated as provided in this Act.

[103] S. 42.

[104] *Ibid.*

[105] *Ibid.*

[106] S. 47.

> . . . shall give judgment for the compensation assessed by the jury, and shall sign the verdict and judgment which shall be kept by the registrar of the Supreme Court or district registrar in the county in which the land is situated.

The cast alone of the *Expropriation Act* suggests the answer "yes" to the question: is provision made for the exercise of a judicial power?" If further support is needed for this conclusion, it may be found in some of the English authorities. For example, in *Regina* v. *The Eastern Counties Railway Company,*[107] Coleridge J. described the proceedings before the sheriff as a "trial."[108] Alderson B., in *In re The Chelsea Waterworks Company; Ex parte Phillips,*[109] confirmed the right "to have the matter fairly tried."[110] And in *Taylor* v. *Clemson,*[111] Lord Brougham spoke of "the Court, the sheriff and jury, which took the inquisition and gave judgment upon it:" it was "a court of limited jurisdiction."[112]

Those words lead one past the question of "judicial power," which now seems settled, to the second branch of the *John East* formulation: is the "Court" a superior, district or county court or a tribunal analogous thereto? The answer seems to be "no." First, in England before 1867 the tribunal was an "inferior court."[113] Second, and perhaps more important, it was a recognized "court" in Canada before Confederation. The Statutes of Upper Canada reveal at least two early enactments[114] requiring the sheriff to act on compensation cases in the same way that his counterpart in England was expected to act. Thus, long before Confederation, compensation was assessed by a jury in the charge of a sheriff. Therefore, it may be safe to say (to adopt the language of Lord Simonds in *John East*) that the issue to be determined under the compensation statutes is "indeed remote from those which at the time of confederation occupied the superior or district or county courts of Upper Canada."[115] In the result, there seems to be no jurisdictional bar to the sheriff acting.

This discussion now turns to a consideration of the sheriff's duties under the provisions of the *Expropriation Act*. Section 38 provides:

> Where a question of disputed compensation is required to be determined by the verdict of a jury, the promoters shall issue their warrant to the sheriff, requiring him to summon a jury. The warrant shall be under the seal of the promoters if a corporation or, if not a corporation, under the hands and seals of the promoters, or any 2 of them. If the sheriff is interested in the matter in dispute, the warrant shall be issued to a disinterested person to be nominated by the Supreme Court. The person, when nominated, shall fulfil the functions delegated to the sheriff by this Act. The word "sheriff" for this purpose includes the person lawfully acting in his place.[116]

There is no statutory form of warrant, so that any paper declaring itself to be a warrant and sealed as the section requires is presumably sufficient. Forms of warrants are reproduced in the report of *Taylor* v. *Clemson*[117] and in the first edition of Mather,[118] but one can only speculate on what words a modern warrant might contain.

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[107] *Supra*, note 92.

[108] *Ibid.* at 948.

[109] (1855) 10 Exch. 730, 156 E.R. 635.

[110] *Ibid.* at 636 E.R.

[111] *Supra*, note 78.

[112] *Ibid.* at 1245.

[113] *Ibid.*

[114] *See An Act to Confer upon His Majesty Certain Powers and Authorities, Necessary to the Making, Maintaining and Using the Canal Intended to be Completed under His Majesty's Direction, for Connecting the Waters of Lake Ontario with the River Ottawa, and for other Purpose Therein Mentioned*, 8 Geo. IV, c. I (1827), ss. V-X and *An Act to Incorporate Certain Persons Therein Mentioned, Under the Style and Title of the Tay Navigation Company*, 1 Will. IV, c. X (1831), ss. XVII-XXI.

[115] *Supra*, note 99 at 150.

[116] A warrant can also be directed to the sheriff under s. 67.

[117] *Supra*, note 78 at 1237.

Presumably, because each sheriff has jurisdiction throughout the Province,[119] the warrant could be issued to any deputy sheriff in British Columbia, no matter where the land may be, and he would be required to act on it. The question is whether he could shift the responsibility by transmitting the warrant to a "sheriff" in another part of the Province. If he could not, there would be obvious problems. For example, the sheriff to whom the warrant is issued may be in Victoria and the land in Stewart, hundreds of miles up the coast. The source of problems of this kind is the provision of the *Sheriff Act*,[120] which gives province-wide jurisdiction. That provision reads:

> The director and each sheriff has jurisdiction throughout the Province to exercise all the powers and perform all the duties imposed on him under this or any other enactment.[121]

There is a difference, however, between conferring the jurisdiction to act, as this provision does, and imposing a requirement to act. The *Expropriation Act* is not the only statute in which the problem arises. An amendment to the *Sheriff Act* would be desirable. Specifically, section 4 of the Act could be made subsection (1) of section 4 and a new subsection (2) added in the following terms:

> (2) It shall be lawful for a sheriff, where any writ, summons, order or warrant is delivered to him, to refer it to any other sheriff in the Province so long as he refers it forthwith and so long as the referral is reasonably justified by an enactment or by the instructions or directions contained in the writ, summons, order or warrant.

At present, there are frequent referrals of writs of execution and other documents in practice, but there is no authority for any of them. Presumably the director can control them under his power to administer "sheriff services generally."[122]

There seems to be little need, now that the office of sheriff is part of the public service, for nomination by the Supreme Court of a person to act in the place of the sheriff where he is interested in the matter in dispute.[123] "Sheriff" includes "deputy,"[124] so that any deputy could act under the provisions if the person to whom the warrant was delivered was "interested."[125] In any event an interested sheriff is much less likely today than formerly. In England, historically, the sheriff was a prominent land-owner or businessman in the County, so the possibility of interest was greater.

Section 40 of the *Expropriation Act* provides for summoning the jury:

> On receipt of the warrant the sheriff shall summon 24 persons qualified to act as jurors in the Supreme Court to meet at a convenient time and place to be fixed by him for that purpose, the time being not less than 14 nor more than 21 days after the receipt of the warrant, and the place being not more than 13 km from the land in question, unless the parties interested consent otherwise. The sheriff shall give notice promptly to the promoters of the time and place fixed.

There is no statutory form of summons. In ordinary civil cases, a notice in writing is delivered or mailed to each prospective juror under section 16 (2) of

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[118] P.E. Mather, *A Compendium of Sheriff Law* (1894) at 429.

[119] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 4.

[120] *Ibid*.

[121] Reference in the section to the "director" is superfluous, because the director is a sheriff by s. 3 (3) of the *Act*.

[122] *Ibid*. s. 3 (1).

[123] In England, except ". . . when there are *two* persons, as in Middlesex and in some counties of cities, constituting *one* officer," the warrant is directed to the coroner if the sheriff is interested. In Middlesex and the other places it goes to the one of the two who has no interest: *see* Atkinson, *supra*, note 71 at 88.

[124] *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 23 (2).

[125] In England, statutory provision was made to allow the "Under Sheriff, or other legally competent Deputy to preside: *supra*, note 91. The statute was necessary because at common law judicial functions could not be delegated: *see*, *e.g.*, *Crane* v. *Adams*, (1858-60) 9 N.B.R. 59 (S.C. *en banc*).

> . . . shall give judgment for the compensation assessed by the jury, and shall sign the verdict and judgment which shall be kept by the registrar of the Supreme Court or district registrar in the county in which the land is situated.

The cast alone of the *Expropriation Act* suggests the answer "yes" to the question: is provision made for the exercise of a judicial power?" If further support is needed for this conclusion, it may be found in some of the English authorities. For example, in *Regina* v. *The Eastern Counties Railway Company,*[107] Coleridge J. described the proceedings before the sheriff as a "trial."[108] Alderson B., in *In re The Chelsea Waterworks Company; Ex parte Phillips,*[109] confirmed the right "to have the matter fairly tried."[110] And in *Taylor* v. *Clemson,*[111] Lord Brougham spoke of "the Court, the sheriff and jury, which took the inquisition and gave judgment upon it:" it was "a court of limited jurisdiction."[112]

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This discussion now turns to a consideration of the sheriff's duties under the provisions of the *Expropriation Act*. Section 38 provides:

> Where a question of disputed compensation is required to be determined by the verdict of a jury, the promoters shall issue their warrant to the sheriff, requiring him to summon a jury. The warrant shall be under the seal of the promoters if a corporation or, if not a corporation, under the hands and seals of the promoters, or any 2 of them. If the sheriff is interested in the matter in dispute, the warrant shall be issued to a disinterested person to be nominated by the Supreme Court. The person, when nominated, shall fulfil the functions delegated to the sheriff by this Act. The word "sheriff" for this purpose includes the person lawfully acting in his place.[116]

There is no statutory form of warrant, so that any paper declaring itself to be a warrant and sealed as the section requires is presumably sufficient. Forms of warrants are reproduced in the report of *Taylor* v. *Clemson*[117] and in the first edition of Mather,[118] but one can only speculate on what words a modern warrant might contain.

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[107] *Supra*, note 92.

[108] *Ibid.* at 948.

[109] (1855) 10 Exch. 730, 156 E.R. 635.

[110] *Ibid.* at 636 E.R.

[111] *Supra*, note 78.

[112] *Ibid.* at 1245.

[113] *Ibid.*

[114] *See An Act to Confer upon His Majesty Certain Powers and Authorities, Necessary to the Making, Maintaining and Using the Canal Intended to be Completed under His Majesty's Direction, for Connecting the Waters of Lake Ontario with the River Ottawa, and for other Purpose Therein Mentioned*, 8 Geo. IV, c. I (1827), ss. V-X and *An Act to Incorporate Certain Persons Therein Mentioned, Under the Style and Title of the Tay Navigation Company*, 1 Will. IV, c. X (1831), ss. XVII-XXI.

[115] *Supra*, note 99 at 150.

[116] A warrant can also be directed to the sheriff under s. 67.

[117] *Supra*, note 78 at 1237.

Presumably, because each sheriff has jurisdiction throughout the Province,[119] the warrant could be issued to any deputy sheriff in British Columbia, no matter where the land may be, and he would be required to act on it. The question is whether he could shift the responsibility by transmitting the warrant to a "sheriff" in another part of the Province. If he could not, there would be obvious problems. For example, the sheriff to whom the warrant is issued may be in Victoria and the land in Stewart, hundreds of miles up the coast. The source of problems of this kind is the provision of the *Sheriff Act,*[120] which gives province-wide jurisdiction. That provision reads:

> The director and each sheriff has jurisdiction throughout the Province to exercise all the powers and perform all the duties imposed on him under this or any other enactment.[121]

There is a difference, however, between conferring the jurisdiction to act, as this provision does, and imposing a requirement to act. The *Expropriation Act* is not the only statute in which the problem arises. An amendment to the *Sheriff Act* would be desirable. Specifically, section 4 of the Act could be made subsection (1) of section 4 and a new subsection (2) added in the following terms:

> (2) It shall be lawful for a sheriff, where any writ, summons, order or warrant is delivered to him, to refer it to any other sheriff in the Province so long as he refers it forthwith and so long as the referral is reasonably justified by an enactment or by the instructions or directions contained in the writ, summons, order or warrant.

At present, there are frequent referrals of writs of execution and other documents in practice, but there is no authority for any of them. Presumably the director can control them under his power to administer "sheriff services generally."[122]

There seems to be little need, now that the office of sheriff is part of the public service, for nomination by the Supreme Court of a person to act in the place of the sheriff where he is interested in the matter in dispute.[123] "Sheriff" includes "deputy,"[124] so that any deputy could act under the provisions if the person to whom the warrant was delivered was "interested."[125] In any event an interested sheriff is much less likely today than formerly. In England, historically, the sheriff was a prominent land-owner or businessman in the County, so the possibility of interest was greater.

Section 40 of the *Expropriation Act* provides for summoning the jury:

> On receipt of the warrant the sheriff shall summon 24 persons qualified to act as jurors in the Supreme Court to meet at a convenient time and place to be fixed by him for that purpose, the time being not less than 14 nor more than 21 days after the receipt of the warrant, and the place being not more than 13 km from the land in question, unless the parties interested consent otherwise. The sheriff shall give notice promptly to the promoters of the time and place fixed.

There is no statutory form of summons. In ordinary civil cases, a notice in writing is delivered or mailed to each prospective juror under section 16 (2) of the *Jury Act.*[126] People qualified to act as "jurors in the Supreme Court" are those not disqualified by section 3 of the *Jury Act.*[127] The sheriff need not worry if he summons people who are not qualified. That is a matter for the parties, who have the right to challenge.[128] The time limitation prescribed by the provision is clear enough. So is the location at which the inquiry is to take place. Here is an example of a situation in which an enactment would "reasonably justify" referral of the warrant by one sheriff to another. It is not reasonable that the deputy in Victoria be required, without option, to act on a warrant where section 40 declares that the inquiry must be held near Stewart. It is uncertain for whose "convenience" the time and place of the meeting are to be fixed and there is no guidance in the authorities. Because the sheriff must notify the promoters of these details, their convenience is probably not what is meant. Is it the convenience of the landowner? As well, as "plaintiff," does the owner have the control which plaintiffs in ordinary civil actions have over the trial date? There is no statutory form of notice which the promoters are entitled to receive although probably a letter from the sheriff would suffice.

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[118] P.E. Mather, *A Compendium of Sheriff Law* (1894) at 429.

[119] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 4.

[120] *Ibid*.

[121] Reference in the section to the "director" is superfluous, because the director is a sheriff by s. 3 (3) of the *Act*.

[122] *Ibid*. s. 3 (1).

[123] In England, except ". . . when there are *two* persons, as in Middlesex and in some counties of cities, constituting *one* officer," the warrant is directed to the coroner if the sheriff is interested. In Middlesex and the other places it goes to the one of the two who has no interest: *see* Atkinson, *supra*, note 71 at 88.

[124] *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 23 (2).

[125] In England, statutory provision was made to allow the "Under Sheriff, or other legally competent Deputy to preside: *supra*, note 91. The statute was necessary because at common law judicial functions could not be delegated: *see*, *e.g.*, *Crane* v. *Adams*, (1858-60) 9 N.B.R. 59 (S.C. *en banc*).

Section 41 of the *Expropriation Act* provides:

> From the persons summoned a jury of 8 shall be drawn by the sheriff, in the manner juries in the Supreme Court are required to be drawn, and if a sufficient number of jurors do not appear to the summons, the sheriff shall return other qualified jurors from persons that can speedily be procured to make up the jury. All parties concerned may have their lawful challenges, but a party may not challenge the whole group.

In the Supreme Court of British Columbia, a jury is drawn by the court clerk, not the sheriff. In practice, the names of all the people summoned are put into a box. Names are then selected from the box as one would select winning tickets in a lottery and prospective jurors come forward as their names are called. They are sworn as jurors if they are not challenged. The "lawful challenges" to which the *Expropriation Act* refers are presumably those challenges which a party is entitled to make in a civil cause.

There is a right at common law to challenge the array where it is alleged that the sheriff has not empanelled indifferent jurors.[129] In addition, section 18 of the *Jury Act*[130] authorizes each party to challenge any person for cause and to challenge not more than four people peremptorily. But as section 41 of the *Expropriation Act* provides, a party cannot "challenge the whole group." The "group" means the group of 24 who are summoned. That means that the "array" cannot be challenged as it could be in civil and criminal proceedings generally.[131] Nothing is said in section 41 about what the sheriff should do if all those summoned are successfully challenged, one by one, although provision for the return of "talesmen" is made where not enough of those who are summoned appear. It is unlikely of course that all 24 would be challenged.

The responsibilities of the sheriff while presiding over the "compensation court" are only vaguely described by the *Expropriation Act*. Section 42 provides:

> The sheriff shall preside on the inquiry, and the party claiming compensation is the plaintiff, and has all the rights and privileges a plaintiff is entitled to in a trial at

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[126] R.S.B.C. 1979, c. 210.

[127] *Ibid.*

[128] *In re The Chelsea Waterworks Company; Ex parte Phillips*, *supra*, note 109 at 733, *per* Parke B. The decision is consistent with s. 21 of the *Jury Act*, R.S.B.C. 1979, c. 210.

[129] *See*, *e.g.*, Sir P. Devlin, *Trial by Jury* (1956) at 26 and *see* section C of Chapter VIII of this paper.

[130] R.S.B.C. 1979, c. 210. *See* Law Reform Commission of British Columbia, Peremptory Challenges in Civil Jury Trials (Working Paper No. 37, 1982).

[131] Section XLII of the *Lands Clauses Consolidation Act, 1845*, 8 & 9 Vict., c. 18 provided that no "Party shall challenge the Array." It is uncertain why the challenge was taken away or why "array," which is a term of art, was replaced with "the whole group" in the British Columbia legislation.

> law. If either party makes a request in writing, the sheriff shall summon persons necessary as witnesses or order the jury or 6 or more of them to view the place or matter in controversy, similar to a view under Supreme Court practice.

An immediate question is: who in fact should preside? In the past, when there were sheriffs of counties, the answer was clear. It is not clear now that they are things of the past in this Province. Is the "plaintiff" entitled to choose the person who will preside? Does the director choose, or is the choice made by the regional, district or local manager? Who says which one, and what can a party do if he is dissatisfied with a choice that is made for him?

There is no doubt that the responsibility to preside is not reserved for the director, because "sheriff" includes "deputy;"[132] thus, any deputy sheriff could presumably preside. It may be that the local managers of the larger offices and the senior deputy sheriffs in charge in smaller communities would have some legitimate claim to preside, if only on grounds of seniority.

What does presiding entail? Section 47 provides that the presiding official must administer an oath to the jury "that they will truly and faithfully inquire about and assess the compensation or damage for which their verdict is to be given." The section contains the only guidance one can find for the form of the oath — there is no statutory form, and Mather is not helpful.

The status of "plaintiff" given by section 42 to the party claiming compensation raises another issue. In 1837, a "plaintiff" argued,[133] because he was deemed by statute "to be plaintiff, and entitled to the same rights and privileges as plaintiffs in actions at law," that he should be allowed "such costs as are usually allowed to the successful party in trials of civil causes in the Court of King's Bench."[134] The court would not interpret the words quite that freely. Lord Denman C.J. said:[135]

> The words in sect. 66, that the party claiming compensation shall be "deemed to be plaintiff, and entitled to the same rights and privileges as plaintiffs in actions at law," were clearly intended, not for the purpose which has been attributed to them, but to regulate the general course of proceedings, to remove doubts concerning the right to begin, and to shew, in other respects, how the inquisition should be conducted.

In the result, it appears that the presiding sheriff should conduct the inquiry as a judge would conduct a civil cause in a superior court, and should look to Rule 40 of the Rules of Court for guidance. So much of that Rule as makes sense should be applied, having regard to the nature of the proceeding.

Section 42 of the *Expropriation Act* empowers the sheriff to summon witnesses when asked in writing by either of the parties to do so.[136] There is no statutory form of summons and no provision is made for the issuance by the sheriff of a *subpoena*.[137] That provision and section 44 (which provides that a person who does not appear as a witness when summoned forfeits a sum not exceeding $50.00 to the "party aggrieved") taken together suggest that the sheriff has no power to fine or commit defaulters for contempt. Section 43 reinforces this argument. Subsection (2) makes people summoned as jurors who do not appear, and those who do appear but who fail to take the oath, liable to pay a penalty not exceeding $50.00 "recoverable by action in the Supreme Court." But it also provides that " . . . a juror is subject to the same regulations and penalties as if the jury had been returned for a trial in the

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[132] *Interpretation Act*, R.S.B.C. 1979, c. 23 (2).

[133] In *The King* v. *Gardner*, (1837) 6 Ad. & El., 112 E.R. 43 (K.B.).

[134] *Ibid*. at 43 E.R.

[135] *Ibid*. at 45 E.R.

[136] It also empowers the sheriff to administer an oath to them when they appear. But provision is not made for a form of oath. The safest course is to "borrow" the oath used in civil causes.

[137] A Form of Summons to Witness used in England before the turn of the century is reproduced in *Mather, supra*, note 118 at 433.

Supreme Court." Hence the sheriff could deal with an uncooperative juror as a contemnor — this power is clearly given. Absence of the express grant of a similar power in section 42 suggests that it is not to be implied.[138]

In furtherance of his general duty to conduct the inquiry as if it were an action at law, the sheriff may rule on the admissibility of evidence. Provision for this power is not made by statute, but it is an undoubted responsibility by common law.[139] Indeed, it is necessary for the sheriff to know some *special* rules of evidence, such as that to which Mather refers. Evidence of " . . . prices given by the promoters, or received by others, for land or by way of compensation for damage to land in the neighbourhood or elsewhere" should not be admitted in chief but only in cross-examination. The "strict rule should be observed."[140]

The sheriff must also direct or charge the jury.[141] A charge might be to this effect: that it is not for the jury to decide whether the person claiming compensation is entitled to the interest he claims, but only to value the interest, on the assumption that the claimant is entitled;[142] or (as section 48 of the *Expropriation Act* requires): that separate verdicts must be delivered where the inquiry concerns both "the value of land to be purchased" and "compensation for injury to the land held with it," or: "the proper mode of estimating the amount to be paid."[143] Misdirection by the sheriff might result in an order for injunctive or prerogative relief from a superior court.[144]

By section 49 of the Act, the sheriff is required "to give judgment for the compensation assessed by the jury."[145] He must also "sign the verdict and judgment which shall be kept by the registrar of the Supreme Court or District Registrar in the county in which the land is situate." It is not clear who has the duty to deposit the verdict and judgment as required. Is it the successful party or the sheriff, who must discharge the responsibility of putting the records[146] into the registrar's hands? The registrar seems only to have the duty to keep them once they are deposited with him. Even if the verdict and judgment are not "recorded" as required, the verdict may be proven by parol evidence in proceedings in which the inquiry is challenged. The sheriff himself can be called to testify about what took place.[147]

For what is the judgment given? In *The King* v. *The Justices of the West Riding of Yorkshire*,[148] the justices who presided[149] gave judgment, but not quite in the terms of the verdict. The promoters (a railway undertaking) argued that the verdict was illegal and insisted on the right to enter upon the land they had acquired. On a *mandamus* application, the duty of the justices was made clear:[150]

> The justices at sessions are directed to give judgment for such purchase-money as shall be assessed by the jury. What right have we to say that they shall give

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[138] The forfeiture provisions of ss. 43 and 44 are obviously antiquated. Defaulting sheriffs could be dealt with under s. 5 of the *Offence Act*, R.S.B.C. 1979, c. 305. Defaulting jurors and witnesses could be fined for contempt of the tribunal. Committal is not an appropriate tool for an inferior "court" of this kind.

[139] *See, e.g., Regina* v. *The Eastern Counties Railway Company, supra*, note 92 at 946.

[140] Mather, *supra*, note 118 at 435-6.

[141] *See, e.g., Regina* v. *The Eastern Counties Railway Company, supra*, note 92 at 947-8 and *The King* v. *High Bailiff of Westminster; Ex parte The London County Council*, [1903] 2 K.B. 189 at 196.

[142] *Brandon* v. *Brandon*, (1864) 34 L.J. Ch. 333, 62 E.R. 637.

[143] *Chabot* v. *Viscount Morpeth, supra*, note 92 at 528.

[144] *Walker* v. *London and Blackwall Railway Company*, (1842) 3 Q.B. 743, 114 E.R. 692.

[145] The sheriff's judgment is enforceable by action: *see The East and West India Docks and Birmingham Junction Railway Company*, (1850-51) 3 Mac. & G. 155 (Ch.), 42 E.R. 220 at 226, *per* the Lord Chancellor.

[146] Section 49 of the *Expropriation Act*, R.S.B.C. 1979, c. 117 requires the verdict and judgment to be recorded.

[147] *See, e.g., Manning* v. *The Eastern Counties Railway Company, supra*, note 92 at 243.

[148] *Supra*, note 79.

[149] There is provision in s. 24 of the *Expropriation Act*, for determination by "justices" of disputed compensation.

[150] *Supra*, note 79 at 574, *per* Littledale J.

> judgment according to what is termed the legal effect of the verdict. They must give it according to the finding, as the act requires.

On the authority of this decision, it seems the sheriff who gives judgment under section 2 must give it, as it were, as he gets it from the jury.

What should the sheriff do about judgment where a claim is settled while it is before the jury? According to *The King* v. *High Bailiff of Westminster; Ex parte The London County Council*,[151] he should direct a verdict for the amount of the offer, " . . . for the purpose of making it clear how the costs [are] to be dealt with."[152] In the British Columbia *Expropriation Act*, the sheriff is not given the power to award costs,[153] although detailed provision for costs is made by section 50:

> (1) On every inquiry before a jury, where the verdict of the jury is given for a greater sum than the sum previously offered by the promoters, all the costs of the inquiry shall be borne by the promoters.
>
> (2) If the verdict of the jury is given for the same or a smaller sum than the sum previously offered by the promoters, or if the owner of the land failed to appear at the inquiry, having received notice of it, of the costs of summoning, empanelling, and returning the jury, of taking the inquiry, and recording the verdict and judgment, in case a verdict is taken, shall be defrayed by the owner of the land, and the other 1/2 by the promoters, and each party shall bear his other costs, incidental to the inquiry.

Payment of costs turns on the verdict, and unless judgment is entered in the way suggested by the court in the case of the *High Bailiff*, then nothing could be done about them — and someone would suffer.

Must the judgment be given in any special way? In *Taylor* v. *Clemson*,[154] the jurisdiction of the sheriff and jury was called into question on the ground that the inquisition did " . . . not set forth the material requisites of the Act to put the sheriff and jury in motion."[155] Put another way:[156]

> . . . it was said that before any jury could be impanelled under the Act, it was necessary that there should have been a disagreement between the parties; and that no such disagreement being set forth, the condition precedent to the jurisdiction vesting under the Act, is wanting.

Lord Brougham said:[157]

> Now it cannot be doubted, that where a Court of limited jurisdiction, limited either in point of place or of subject-matter, assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or all the particulars out of which its jurisdiction arises.

And later he said:[158]

> It is necessary that the jurisdiction should appear, but there is no particular form in which it must be made to appear. The Court above, which has to examine, and may control the inferior Court, must be enabled somehow or other to see that there is jurisdiction, such jurisdiction as will support the proceeding, but in what way it shall see is not material, provided it does so see.

It was enough that the "Plaintiff in Error" had appeared, and that his appearance was clear from the verdict. Here the court drew on the analogy of waiver; as Lord Brougham remarked: "I hardly know of any . . . defect which may not be cured by the party appearing to it . . . ."[159]

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[151] *Supra*, note 141.

[152] *Ibid*. at 196, *per* Channell J. *See also Re North London Railway Company; Ex parte Hayne*, (1865) 12 L.T. 200, where "counsel agreed that the jury should give a verdict for L600."

[153] *Expropriation Act*, s. 51. *But see* s. 24, where the "costs of the inquiry are in the discretion of the justices." *And see* s. 87 (2), where the sheriff is required to settle "the costs accruing from the issue and execution" of a warrant directing the sheriff to deliver up possession of land.

[154] *Supra*, note 78.

[155] *Ibid*. at 1239 (from the report of the argument of counsel for the Plaintiff in Errors).

[156] *Ibid*. at 1246, *per* Lord Brougham.

[157] *Ibid*. at 1245.

[158] *Ibid*. at 1246.

The same argument had been made in the earlier case of *The Queen* v. *The Trustees of Swansea Harbour.*[160] There, Littledale J. said flatly:[161] "It is evident from the inquisition that the parties differed as to price or recompence: else why was the jury summoned?" He continued:[162]

> As to the necessity of the record being drawn in a particular form to shew jurisdiction, it states that, the parties appearing, the jury give their verdict for certain amounts as purchase-money and recompence to be paid by the trustees, and the Court adjudge the said sums to be paid by them: and the statute does not require any regular form.

What is the effect of judgment? What powers, if any, does the sheriff have once judgment has been given? The answer seems to be that he has no powers at all. In the case of *Chabot* v. *Viscount Morpeth*, it was held that the sheriff " . . . after ordering payment of the sum assessed, was *functus officio*."[163]

(g) The Duty to Take Possession

The *Expropriation Act* is the source of another Crown duty for the sheriff. Section 87 provides:

> If . . . the promoters are authorized to enter and take possession of land required for the undertaking, and the owner or occupier of the land or any other person refuses to give up possession or hinders the promoters from entering or taking possession, the promoters may issue their warrant to the sheriff to deliver possession of the land to the person appointed in the warrant to receive it.

There is no statutory form of warrant.

The duty to act on the warrant is given by section 87 (2):

> On receipt of the warrant the sheriff shall deliver possession of the land to the person appointed, and the costs accruing from the issue and execution of the warrant, to be settled by the sheriff, shall be payable by the person refusing to give possession . . . .

Chapter VII contains a discussion of the writ of possession and who the sheriff could take with him in order to deliver possession and who he could call upon for help if he thought he needed it. The sheriff likely has the same powers and responsibilities under this section that he has when executing the court's writ. This work should be done by the sheriff, but the legislation should provide that the court be asked first to order that possession be delivered up, failing which the sheriff may act pursuant to a writ of possession.

2. FEDERAL LEGISLATION

(a) The Duty to Read the "Riot Act" and to Suppress Riots[164]

Since earliest times, and certainly before the Conquest,[165] the sheriff was responsible for keeping the sovereign's peace. By the fourteenth century, some of the peace-keeping obligations had been confirmed by statute — in particular, those obligations which concerned riots. Thus, by 17 Ric. II, c. 8 (1393), the sheriff was required to take with him "the strength of the county and country"[166] and to "set disturbance against" riotous assemblies. Similar injunctions were contained in later statutes, among them these: 13 Hen. IV, c. 7 (1411), 2 Hen. V, c. 8 (1414) and 19 Hen. VII, c. 13 (1503).[167] In each case, it was the sheriff's job to suppress the riotous assemblies or "routs of people"[168] and to arrest offenders. Then came what is now popularly known as "The Riot Act": 1 Geo. 1, St. 2, c. 5 (1714). It preserved the sheriff's obligation to suppress "riots and tumults,"[169] but imposed upon him the additional duty of first making or causing to be made in a loud voice the following proclamation:[170]

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[159] *Ibid.* at 1247.

[160] (1839) 8 Ad. & El. 439, 112 E.R. 905.

[161] *Ibid.* at 448.

[162] *Ibid.*

[163] *Supra*, note 92 at 528-9.

[164] This is not an idle discussion. As recently as June 2, 1981, the "Riot Act" was read by a Mayor at Matsqui, British Columbia when 300 prisoners seized control of a jail. *See* The [Vancouver] *Province*, June 3, 1981 at p. 1.

[165] Morris, *supra*, note 2 at 28.

> OUR sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies.
> God save the King.

Erskine, in an address to a jury in 1781[171] said that:

> . . . the Riot Act was made upon the elevation of the family of Hanover to the throne, to prevent the disorders that might be occasioned by those who were enemies to that accession.

The Act, said Lord Mansfield,[172] was " . . . a step *in terrorem* and of gentleness." The words were not a "necessary step," because the magistrate "may instantly repel force by force," but "[i]f the insurgents are not doing any act, the reading of the proclamation operates as notice."

The *Riot Act* was part of the first *Criminal Code of Canada*.[173] Its provisions are now contained chiefly in sections 68, 69 and 70 of that enactment.[174] Section 68 is worth reproducing, if only to observe the striking resemblance of the proclamation to its eighteenth-century grandparent:

> A justice, mayor or sheriff or the lawful deputy of a mayor or sheriff who receives notice that, at any place within his jurisdiction, twelve or more persons are unlawfully and riotously assembled together, shall go to that place and, after approaching as near as safely he may do, if he is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:
> Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business upon the pain of being guilty of an offence for which, upon convictions, they may be sentenced to imprisonment for life.
> GOD SAVE THE QUEEN.[175]

No special offence is created where any of these "magistrates" does not make the required proclamation. But a general offence is created by section 70, which provides:

> A peace officer who receives notice that there is a riot within his jurisdiction and, without reasonable excuse, fails to take all reasonable steps to suppress the riot is guilty of an indictable offence and is liable to imprisonment for two years.

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[166] This is a reference to the *posse comitatus*.

[167] For a general discussion of the riot statutes, *see* the report of Lord Chief Justice Tindal's charge to the Bristol Grand Jury (2 January 1832) printed as a note to *Rex* v. *Pinney*, (1832) 5 Car. & P. 254, 172 E.R. 962.

[168] As 13 Hen. IV, c. 7 (1411) described them.

[169] The obligation was for the first time also imposed on mayors, bailiffs and head officers (*see* s. I), although it had previously been reserved for sheriffs and justices of the peace.

[170] *See* s. II.

[171] *Rex* v. *Kennett*, (1781) 5 Car. & P. 282, 172 E.R. 976 at 981.

[172] *Ibid*. at 984.

[173] 55-56 Vict., c.29, s.83 (1892). Its Canadian predecessor was 31 Vict., c.70, s.2 (1868).

[174] R.S.C. 1970, c. C-34.

[175] The words "God Save the Queen" are not mere surplusage. *See, e.g., Rex* v. *Child*, (1830) 4 Car. & P. 442; 172 E.R. 774 where the proclamation was read by a magistrate after 250 people gathered together and threatened to break threshing machines. He omitted, however, to say "God Save the King" and on the hearing of an indictment against some of those who had assembled and remained an hour after the proclamation was made, Vaughan B. and Alderson J. held that the charge could not be supported in the absence of the words.

A sheriff is a "peace officer," so that when he receives notice that there is an unlawful and riotous assembly within his jurisdiction,[176] he must act.[177] He must act first by going to the place for the purpose of determining whether "a riot is in progress," then by attempting to make the proclamation, the reading usually being (it is suggested) the first "reasonable step" in the suppression of a riot. That seems to be the approach taken in England.

Rex v. *Kennett*[178] helps to define "reasonable excuse" insofar as the proclamation is concerned. Lord Mansfield said:[179]

> It is *prima facie* the duty of a magistrate to read the Act; but this duty depends on circumstances: he might be alone, and not able to do it. If he did what a firm and constant man would have done, he must be acquitted.

Thus the obligation to make the Queen's command, in the right circumstances, and after going amongst the rioters, is not an absolute one, but it is nearly so.

Who must act? Section 68 imposes the obligation on any sheriff and on any of his lawful deputies to whom notice of a riotous assembly is given. That would include the director, his or her assistant, possibly the regional and district managers, and all the deputies. "Sheriff's officers," the "fee-for-service" process servers and the clerks and stenographers are probably excused because they are not "deputies" at common law. However, the contract process servers may be required to act under section 70, if not under section 68, because they fall within the definition of "peace officers" in section 2 of the *Code*.[180]

Of course, no proclamation need ever be made by anyone unless the person to whom the notice is given is satisfied after observation that there is a riot. Section 65 of the *Code* quite unhelpfully defines "riot" to mean: "an unlawful assembly that has begun to disturb the peace tumultuously." According to section 64 (1), an "unlawful assembly:"

> . . . is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they
>
> (a) will disturb the peace tumultuously, or
>
> (b) will by that assembly and without reasonable cause provoke other persons to disturb the peace tumultuously.

There is some help from the cases. In *Regina* v. *Vincent*,[181] Baron Alderson said:[182]

> I take it to be the law of the land that any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquility and peace of the neighbourhood is an unlawful assembly.

"Unlawful assemblies" and "riots" were compared recently by the English Court of Criminal Appeal in *Regina* v. *Caird*:[183]

> There has been canvassed before this Court the distinction between unlawful and riotous assemblies. Unlawful assemblies and riotous assemblies take many

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[176] Would a deputy be excused from acting who has been told about a riot 100 miles away, but still within his jurisdiction, as s. 4 of the *Sheriff Act*, R.S.B.C. 1979, c. 386 defines it?

[177] The Crown Solicitor in Saskatchewan who advises sheriffs has said in a guide to them that s. 68 " . . . is probably applicable to a Saskatchewan sheriff and in the history of this province has been a duty exercised by some sheriffs." There is little doubt that the Saskatchewan sheriff is bound to act.

[178] *Supra*, note 171.

[179] *Ibid*. at 984.

[180] It provides that "peace officer" includes a person employed "for the service or execution of civil process." The "fee-for-service" process services are not "employed" in the way that all the others in sheriff services are, but it is clear that they are "employed" to do the work. The point is arguable, so some clarification is desirable.

[181] (1839) 9 Car. & P 91, 173 E.R. 754.

[182] *Ibid*. at E.R. 762.

[183] (1970) 54 Cr. App. R. 499 at 504-5.

> forms. Without, of course, attempting a full definition, the difference can be stated in broad terms applicable to occasions of the particular type under consideration. The moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful . . . The assembly becomes riotous *at latest* when alarming force or violence begins to be used.

Thus, there were riots where one mob pulled down two houses and threatened the destruction of a Roman Catholic chapel[184] and where another "destroyed the bishop's palace, and the prison at Lawford's-gate" and "burnt the Mansion-house, the Excise-office, the Custom-house, and two sides of Queen's square."[185] But there was no riot when 150 young people gathered to block a public road in Vancouver, even though stones were thrown at police who were called out to disperse the crowd.[186]

Obviously, the question whether an assembly is tumultuously disturbing the peace[187] is one for the judgment of the sheriff or his deputy in the circumstances of each case. For their own protection, deputies would be advised to err on the side of "riot" in order to avoid the penalty which section 70 imposes. Because they seem to have no less authority to use force in checking an unlawful assembly than they would in quelling a riot, there is no risk to them in wrongly answering the question of law — at least that is what section 25 (1) and 33 (2) of the *Criminal Code* would suggest.

Beyond "reading the Act," section 70 obligates a person to whom notice of a riot is given to attempt to suppress the tumult. What is the nature of this obligation? This is an issue that might conveniently be discussed in the context of the sheriff "as peace officer" because section 70 enjoins a "peace officer" to act, without referring specifically to the sheriff, as section 68 does. But because the sheriff is a peace officer[188] and because section 70 directs that a peace officer who receives notice of a riot must act, the sheriff has no option but to act. It is not a case such as those discussed later in this chapter where the power but not the duty is conferred.

On the assumption that the sheriff has no choice but to move to suppress a riot, either after the proclamation has been read, or without one if he has been prevented from making it or if he thinks it inexpedient to try (assuming Lord Mansfield was correct in concluding that the reading is not a "necessary step"), what "reasonable excuse" might relieve the sheriff from the burden? Would he be excused from the duty to take all reasonable steps because he has alerted the police to the problem? Is alerting the police — so far as the sheriff is concerned — all the "reasonable steps" he need take?[189]

There is also a related question. Where insufficient numbers in some offices limit the speed with which some duties can be performed, what help is there (if any) which the sheriff can summon in taking the necessary action?[190] Historically, in quelling riots, the sheriff was required to take with him "the strength of the county and country,"[191] "the power of the county,"[192] "the

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[184] This was the *Kennett* case, *supra*, note 171 at 286 and 288.

[185] This was the *Pinney* case, *supra*, note 167 at 269.

[186] *Regina* v. *Thomas*, [1971] 2 W.W.R. 734 (B.C. Co. Ct.) at 736.

[187] It is interesting to see that one definition for "tumultuous" in *The Compact Edition of the Oxford English Dictionary* (1979), at 3431, col. 464, is: "Making a tumult or commotion; acting in a disorderly and noisy way; turbulent, riotous." The first definition given (at col 463) is "Full of tumult or commotion; marked by confusion and uproar; disorderly and noisy; violent and clamorous, turbulent." A wide choice.

[188] *Criminal Code*, R.S.C. 1970, c. C-34, s. 2.

[189] It is important to say that none of the deputies who were asked about riots knew that he was obligated under the *Code* to make the proclamation. All of them thought that their duty was to notify the police and to offer assistance to them.

[190] It is "extremely probable" that assistance will be needed: *see*, *e.g.*, A Justices' Clerk, "Reading the Riot Act" (1949) 113 J.P. 107.

[191] 17 Ric. II, c. 8 (1393).

[192] 13 Hen. IV, c. 7 (1411).

King's liege people being sufficient to travel in the county"[193] and "all His Majesty's subjects of age and ability."[194] These are all descriptions of the *posse comitatus*, which Dalton said included:[195]

> . . . all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants and apprentices, [and] all other such persons being above the age of 15 years, and that are able to travel.

Blackstone[196] and Watson[197] restricted the candidates to those "under the degree of peer" and Mather[198] and Gladwin[199] suggest a further restriction of the class to those not above 70 years. Impey[200] would exempt "woman, ecclesiastical persons, and such as be decrepit, or do labour of any continual infirmity." When he charged the jury in *Rex v. Kennett*,[201] Lord Mansfield said[202] of those required to suppress riots that "they may assemble all the King's subjects" and that "they may call in the soldiers, who are subjects" — though it "should be done with great caution"[203].

It seems from section 118 of the *Criminal Code*[204] that the sheriff is not restricted at all in the people — including women and clergymen — from whom he can demand help in discharging his duty under section 70. By section 118, every one who " . . . omits, without reasonable excuse, to assist a . . . peace officer in the execution of his duty . . . in preserving the peace, after having reasonable notice that he is required to do so," is guilty of an offence. So it seems that the sheriff can put out a general call — to the police, the military[205] and to the public at large. Resisters can refuse to help at their own risk.[206]

When and how is assistance to be summoned? The *Criminal Code* gives no guidance; nor did the earliest statutes in England. But in a statute of 1414 came the requirement that those summoned be "reasonably warned."[207] That is the requirement in section 118 of the *Code*, so that questions of time and kind are important. There is little help from the cases, although *Rex* v.

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[193] 2 Hen. V, c. 8 (1414).

[194] 1 Geo. I, St. 2, c. 5 (1714).

[195] M. Dalton, *Officium Vicecomitum or The Office and Authoritie of Sherifs* (1623) at 137.

[196] 1 Bl. Comm. 343.

[197] *Supra*, note 72 at 2.

[198] *Mather on Sheriff and Execution Law* (3rd ed., 1935) at 14.

[199] I. Gladwin, *The Sheriff: The Man and his Office* (1974) at 375.

[200] *Supra*, note 73 at 53.

[201] *Supra*, note 171.

[202] *Ibid.* at 984.

[203] *See also* the charge of Littledale J. in *Rex* v. *Pinney*, *supra*, note 167 at 972: " . . . they may call on all the king's subjects to assist them." Those who could be called include the "high and petty constables." *see* 1 Geo. 1, St. 2, c. 5 (1714), s. III and A Justices' Clerk, *supra*, note 190 at 107.

[204] R.S.C. 1970, c. C-34.

[205] It is clear from section 32 (2) of the Code that it was intended that the military might be called in where there is a riot: the provision protects from prosecution those who are bound by military law to obey the commands of their superiors (except where orders are manifestly unlawful) where they are directed to do something for the suppression of a riot. 13 *Encyclopaedia of the Laws of England* (2nd ed., 1908) at 15 states:

With respect to persons under military law, the position appears to be thus correctly stated in the report on the Featherstone Riot (Parl. Pap. 1893-94, C. 7234):-

> A soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself, if, without necessity, he takes human life. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life and limb, and in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interfere on such grave conditions, ought, of course, to be the last expedient of the civil authorities; but when the call for help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanor. The whole action of the military when once called in ought to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done; and the presence of a magistrate, while expedient, is not in the least necessary to entitle the military to act, even by fire, to prevent felonious outrage or dangerous riot.

[206] Undoubtedly age and infirmity would supply the "reasonable excuse," which s. 118 (b) of the Code mentions. Section 32 (3) protects those who do come to help against prosecution for the use of force as long as they act in good faith and as long as the sheriff's orders are not manifestly unlawful.

[207] 2 Hen. V, c. 8, s. II.

Pinney[208] provides some guidance. There, no exception was taken to verbal and written notice apparently requiring immediate attendance. In fact, written notice was recommended for practical reasons: " . . . if verbal messages only had been left for them, the people might, and probably would, have affected not to understand the meaning of the notice."[209]

There is some suggestion in the *Pinney* case that something less by way of notice was required by 57 Geo. III, c. 19 (1817) than might be required where the sheriff is obligated in other circumstances (for example, on an execution) to raise the *posse comitatus*.[210] In *Pinney*, "there was not the formality of summons" which the raising of the *posse* apparently required.[211] In fact, in *Pinney*, the under-sheriff on his own raised a *posse* of 2,700 or 2,800 men, but it was not ready until the disturbance had been quelled.[212] Formality has its problems.

Obviously, what is reasonable notice will depend on the size of the mob, its location, the nature of the disturbance, the property that is threatened, the extent to which violence is employed and perhaps most important, on the likelihood or the fact of injury or death resulting from the disturbance.

What must the sheriff do if no one responds to his summons for assistance? The clear answer seems to be: "nothing." That is the conclusion of the court in *Pinney* at least, where Littledale J. said: "If the defendant did all that he could to assemble a force, it was no fault of his that they would not act."[213]

Assuming that the sheriff as a peace officer must act, what must he do by way of taking "all reasonable steps to suppress the riot? Section 33 (1) of the *Code* provides:

> Where the proclamation referred to in section 68 has been made or an offence against paragraph 69(a) or (b) has been committed, it is the duty of a peace officer and of a person who is lawfully required by him to assist, to disperse or to arrest persons who do not comply with the proclamation.[214]

That seems clear enough, but it does not limit the general duty to suppress the riot which section 70 imposes: paragraph (3) of section 33 makes that clear. So, one must go to the authorities. The test from the common law is this, as Lord Mansfield put it to the jury in *Rex* v. *Kennett:* "Has the defendant laid before you the justification of a man of ordinary firmness?"[215] Littledale, J. said it more explicitly in *Pinney*,[216] where the man accused of neglect of duty was the Mayor of the city of Bristol:

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[208] *Supra*, note 167.

[209] *Ibid.* at 973.

[210] It seems evident from *Pinney*, *ibid.* at 974, that where someone other than a sheriff or a justice of the peace called out a force to quell a riot, it was not the *posse comitatus*, strictly speaking, that they called: " . . . the calling out of the *posse comitatus* is only the calling out of the people to assist the magistracy; and what was done by the mayor on the Sunday morning was the same in effect, only that there was not the formality of summonses." *See also* J. Shaw, 2 *The Practical Justice of Peace* (1736) at 127 where it is made clear that justices raised the *posse* to suppress riots.

[211] For examples of a form of summons, *see* Watson, *supra*, note 72 at 468, C.H. Karraker, *The Seventeenth Century Sheriff. A Comparative Study of the Sheriff in England and the Chesapeake Colonies 1607-1689* (1930) at 176 and *Mather on Sheriff and Execution Law*, *supra*, note 198 at 13.

[212] *Supra*, note 167 at 974.

[213] *Ibid.* at 973.

[214] Despite s. 69(b), of the *Criminal Code*, R.S.C. 1970, c. C-34, which gives rioters 30 minutes to disperse after the proclamation is made [it was one hour in 1 Geo. I, St. 2, c. 5 (1714)], the sheriff's duty is to act immediately to bring calm:

> The form of the Riot Act of 1716 has caused many persons to fall into the error of supposing that because the law allows one hour for the dispersion of a mob to whom the proclamation has been read by a magistrate, during that period the civil power and the King's subjects are bound to remain quiet and passive.
>
> The language of the Act does not warrant any such construction, nor could such have been the intention of the Legislature. The civil authorities are left in possession of all the powers which the law had previously invested them; all peace officers may and ought to do all that in them lies towards the suppression of such meetings, and may command others to assist them; and by the common law, also, any private person may lawfully endeavour to oppose such disturbances by staying the persons engaged from executing their purpose, and by stopping others who are coming to join them, and all persons, even a private individual, may do anything, using force even to the last extremity, to prevent the commission of a felony.
>
> This statement of the law in a charge of Park, J., in 1831 (2 St. Tri. N.S. 1029), is supported by *R.* v. *Gordon*, 1781, 21 St. Tri. 485, and by a series of subsequent judicial rulings, especially in *R.* v. *Pinney*, 1832, 3 St. Tri. N.S. 11. But the notion still persists, and led the Commissioners on the Featherstone Riots to recommend consolidation of the law in a clear form.

See 13 *Encyclopedia of the Laws of England supra*, note 205 at 14-15.

> The question here is, whether the defendant did all that he knew was in his power, and which would be expected from a man of ordinary prudence, firmness, and activity, to suppress these riots. Did he use those means which the law requires to assemble a sufficient force? Did he make all the use of those means which an honest man ought to do by his own personal exertions?

It seems, from these cases, that what is required are the actions of the reasonably brave man — not even those of the reasonably brave sheriff. So the special training that a sheriff may have (in the use of firearms or of a "baton," for instance) may make no difference.

Section 32 (1) of the *Criminal Code* is also relevant:

> Every peace officer is justified in using or in ordering the use of as much force as he believes, in good faith and on reasonable and probable grounds,
>
> (a) is necessary to suppress a riot, and
>
> (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

This provision defines not the minimum that is expected but the maximum that is lawful. It demands the kind of good judgment and common sense that only experience can promise. The single authority (on a precursor of the provision) is *Hebert* v. *Martin*,[217] a decision of the Supreme Court of Canada. The court confirmed the finding of a trial judge who had excused an off-duty police officer in a civil action for damages brought where he had killed a man with his revolver during a riot at a circus.

What size force should a sheriff summon in order to avoid a charge of neglect? In *Pinney*, where soldiers had been called, but had left when the mob was quietened, Littledale J. said:[218]

> With respect to the not providing a sufficient force, there is no doubt that very great calamities afterwards occurred; but I think you ought not to consider that: for, although, if it could have been foreseen that the military would have been withdrawn and such destruction would have ensued, it was possible that a very large civil force might have been collected by great over-exertion on the part of the magistrates; yet you ought to judge only of what appeared at the time, because, as the magistrates could not foresee all this, they might have collected an immense force, and no riot might have taken place: and then the magistrates would only have been laughed at by everybody.

"Extraordinary exertion" in procurring "more force" was not required.[219] A question remains: is a sheriff who alerts the police guilty of neglect where insufficient numbers are called out by the chief constable?

Should the force be armed? Can it be? In the fourteenth century, no second thought to the question was given. Men were expected to "ride armed" upon "a Cry made for Arms to keep the Peace."[220] But by 1596, attitudes had changed. In the *Case of Armes*,[221] the question, "Upon an assembly of all the justices and Barons at Sergeants-Inn," was "... whether men may arm themselves to suppress riots, rebellions, or to resist enemies, and to endeavour themselves to suppress or resist such disturbers of the peace, or quiet of the realm."[222] There was no doubt that sheriffs, among other "ministers" may do it and in the result it was concluded by those in attendance:[223]

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[215] *Supra*, note 171 at 984.

[216] *Supra*, note 167 at 971.

[217] [1931] S.C.R. 145.

[218] *Supra*, note 167 at 971-972.

[219] *Ibid.* at 973.

[220] 2 Edw. III, c. 3 (1328).

[221] (1596) Poph. 121, 79 E.R. 1227. Yet, "the authority of Popham is 'none':" *see* R. Megarry, *A Second Miscellany-at-Law*, (1973) at 120 citing *R.* v. *Starling*, (1664) 1 Keb. 675 at 676. Of course, Keble himself was styled a "feeble" and "bad" reporter and was said to be of "no high repute:" *see* the cases cited *ibid.* at 121, although he was a "tolerable historian of the law:" *ibid.*

[222] *Ibid.*

> . . . that upon cry made for weapons to keep the peace, every man where such accidents happen for breaking the peace, may by the law arm himself against such evil doers to keep the peace.
>
> But they take it to be the more discreet way for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in the doing of it.

The "more discreet way" found favour with the judges in *Pinney,* where Littledale J. said on their behalf that " . . . it would have been the height of imprudence [for the magistrate] to have given fire-arms indiscriminately to persons who might not know their use,"[224] even though in "point of law" he would have been justified in doing so.

In Canada, of course, possession of some weapons, including most firearms, by people other than peace officers[225] or members of the Canadian Forces[226] is prohibited,[227] or is restricted to persons who qualify for a registration certificate.[228] These rules mean that weapons of the sort that might be used to suppress the worst kind of riot are not freely available for distribution by a sheriff to those he summons, even if the need for them arises. Only by invoking what would in the circumstances be a cumbersome procedure under section 14 of the *Police Act*[229] could "subjects" be armed. By that procedure, a provincial court judge is authorized in the event of a riot to swear people as "special constables." And as special constables, they would be entitled to possess the weapons which they could not otherwise legally have. That was in fact the common practice even in the time of *Pinney,*[230] although then the person under the duty to suppress the riot himself swore the people in.

There seems to be no doubt that the sheriff himself need not lead the charge into battle (he "is not bound to go out to head the constables"[231]) — at least not *qua* sheriff. It may be, however, that *qua* peace officer he must do so. Does the greater duty swallow the lesser? This issue may have been overlooked by those who made the sheriff a peace officer for all the purposes of the *Criminal Code*.

The case of *Hebert* v. *Martin,*[232] mentioned earlier hints at the protection that is available to a sheriff who injures a person in the course of acting to suppress a riot. 1 Geo. 1, St. 2, c. 5 (1714) had provided:

> . . . that if the persons so unlawfully, riotously and tumultuously assembled, or any of them, shall happen to be killed, maimed or hurt, in the dispersing, seizing or apprehending, or endeavouring to disperse, seize or apprehend them, by reason of their resisting the persons so dispersing, seizing or apprehending, or endeavouring to disperse, seize or apprehend them, that then every . . . justice of the peace, sheriff, under-sheriff, mayor, bailiff, head-officer, high or petty constable, or other peace officer and all and singular persons, being aiding and assisting to them, or any of them, shall be free, discharged and indemnified, as well against the King's Majesty, his heirs and successors, as against all and every other person

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[223] *Ibid.*

[224] *Supra,* note 167 at 973.

[225] *Criminal Code,* R.S.C. 1970, c. C-34, s. 90 (1) (b).

[226] *Ibid.* s. 90 (1) (a).

[227] *Ibid.* s. 88.

[228] *Ibid.* s. 89.

[229] R.S.B.C. 1979, c. 331.

[230] Supra, note 167. In the note of Chief Justice Tindal's charge to the Bristol Grand Jury, the judge is quoted as having said, at 968: "In later times the course has been for the magistrate, on occasions of actual riot and confusion, to call in the aid of such persons as he thought necessary, and to swear them as special constables." In *Pinney* itself, Littledale J., at 973, mentioned that ". . . several of the persons who came and offered to become special constables had been seen in the riot the night before."

[231] *Rex* v. *Pinney, supra,* note 167 at 972.

[232] *Supra,* note 217.

> and persons, of, for or concerning the killing, maiming, or hurting of any such person or persons so unlawfully, riotously and tumultuously assembled, that shall happen to be so killed, maimed or hurt, as aforesaid.

Still, indictment for wrongdoing was possible. In a note to *Pinney*,[233] Chief Justice Tindal is quoted as having discussed the case of James Crossley Lewis in his charge to the Bristol Grand Jury in January 1832.[234] During a riot, Lewis had shot a boy (although the pistol had not been aimed at him) and stood charged with manslaughter. The Chief Justice is reported to have said:[235]

> The nature . . . of the offence committed by Lewis will not depend so much upon [the fact that Lewis had not aimed at the boy] as upon the circumstances under which the pistol was originally discharged. If the firing of the pistol by Lewis was a rash act, uncalled for by the occasion, or if it was discharged negligently and carelessly, the offence would amount to manslaughter: but if it was discharged in the fair and honest execution of his duty, in endeavouring to disperse the mob, by reason of their resisting; the act of the firing of the pistol was then an act justified by the occasion, under the Riot Act before referred to; and the killing of the boy would then amount to accidental death only, and not to the offence of manslaughter.

Much the same thing was said in the *Pinney* case itself, where Littledale J. described the difficulty for the mayor who was " . . . bound to hit the precise line of his duty."[236] And in *Hebert* v. *Martin*, we have it again from Chief Justice Anglin, for the majority, who saw the questions to be:[237]

> . . . whether [Hebert] in fact entertained the belief, that the riotous assembly would continue, and would probably result in serious injury to [one] Dufresne and also to himself unless immediate steps were taken to suppress it; and, whether he was likewise justified in believing that the use of his fire-arm was, under the circumstances, a means necessary to suppress the riot and 'not disproportioned to the danger which he . . . believed to be apprehended'.

Nothing need be added to that.

Having examined the duty of the sheriff in cases of riot, there remains the question whether his participation is justified in modern times. In one sense to ask this question is to ask whether there is merit these days in reading the "Riot Act" at all. There is no empirical evidence to suggest that reading the "Act" is no longer a useful expedient as a "step *in terrorum* and of gentleness,"[238] and it has never been suggested that the reading does harm by provoking rioters. For these reasons, it seems undesirable to remove the reading from the arsenal of those whose duty requires them to preserve the peace. One cannot be so naive as to think that riots in this society are things of the past, nor so naive as to believe that a proclamation under section 68 will contain every riot. But one can be sensitive enough to feel that awesome displays of force by the police should be avoided whenever possible. Reading the "Riot Act" is one way to attempt, at least, to limit the number of occasions in which force will be necessary.

It is not a "peace officer," who reads the "Act."[239] It probably was no accident that the justices, mayors and sheriffs were chosen in the time of George I to make the proclamation. While then there were no organized police forces, there were high and petty constables who were undoubtedly qualified to do what was required; but they were expressly relegated to the job of assistant.[240] Justices, mayors and sheriffs were probably chosen because in most cases they were known and respected people in their communities and counties. They were people of special authority whose commands in the name of the sovereign would presumably be obeyed.[241]

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[233] *Supra*, note 167, n. (b) at 966-970.

[234] *Ibid.* at 969.

[235] *Ibid.*

[236] *Ibid.* at 971.

[237] *Supra*, note 217 at 146-7.

[238] *See* the text at note 172. Lord Mansfield added that "[t]here never was a riot without by-standers who go off on reading the Act."

[239] "Peace officers" are not mentioned in section 68 of the *Criminal Code*, R.S.C. 1970, c. C-34.

[240] *See* 1 Geo. 1, St. 2, c. 5 (1714), s. III.

Today, except in some rural areas, it is probably wrong to suggest that the sheriffs are known or that they command similar respect. The same cannot necessarily be said for "justices" (which include, in this Province, Provincial Court Judges) or mayors. It is unlikely that the sheriff has the moral authority required to make the reading effective. And as an officer of the court, it may be undesirable in any event for him to participate in what amounts to the enforcement of criminal laws. Of course, the same argument applies to Provincial Court Judges.

Because the sheriff does not have the moral authority which seems to be so essential to the success of the reading, and because his reading might colour his effectiveness as an officer of the court, the sheriff should be relieved of the responsibilities imposed on him by section 68. Equally, it is suggested that he should be relieved of the duty he now has as a peace officer under section 70. He has neither the resources nor the special experience[242] which the police have, and his participation (which is mandatory if he receives notice of a riot) is an anachronism.[243]

(b) Duties in Connection with Jails

The connection of the sheriff with jails is an ancient one. Morris tells us[244] that the Assize of Clarendon in 1166 enacted that " . . . jails be built in counties where there were none, and placed either in a borough or a castle so that sheriffs might in these guard . . . the criminals who were taken." And in an annotation to *Mitton's Case*,[245] it is stated that in

> Mich. 39 & 40 Eliz. [1597-98] at Serjeant's Inn in Fleetstreet it was resolved by Popham and Anderson Chief Justices, and all the Justices of England, that the custody of the gaols of the counties of right belongs and is annexed and incident by law to the office of sheriffs, and that well appears by the judgment in Parliament anno. 14 E. 3 cap. 10 [1341] by which it is ordained and enacted, that all gaols of counties shall be rejoined to sheriffs, and the sheriffs shall have the custody of the same gaols, as always before this time they were wont to have; and that they shall put in such keepers for whom they will answer.

Despite this historical claim to be jailer, the responsibility was lost to the sheriff in England by the *Prisons Act, 1865*.[246] As Churchill said:[247]

> . . . the power of appointing the gaoler was taken away from the sheriff and vested in the justices of the peace for the county, and every prisoner confined in a prison was by that statute placed in the legal custody of the gaoler, instead of the sheriff as formerly.

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[241] One can only speculate here because there are so few relevant cases. Erskine, *supra*, note 171 at 981 indicates that *Rex* v. *Kennett*, (1781) was the first prosecution of a magistrate under 1 Geo. 1, St. 2, c. 5 (1714) and Littledale J., *supra*, note 167 at 964, states that *Rex* v. *Pinney*, (1832) was the second. The absence of prosecutions during tumultuous times in England might suggest that magistrates have acquitted themselves properly in discharging their duties under the riot legislation.

[242] Some deputies are former policemen but most of them are not and most of them feel the distinction between themselves and policemen very keenly.

[243] *See, e.g., Mather on Sheriff and Execution Law, supra*, note 198 at 14: "The last recorded instance of the raising of this force on any considerable scale seems to have occurred in 1830, when the Sheriff of Oxfordshire is related to have summoned every male resident between the ages of fifteen and seventy to attend, in order to put down riots arising as the result of an enclosure award." Gladwin, *supra*, note 199 at 375, mentions the same incident, but suggests that it was the last occasion when a sheriff had had to raise a *posse* for any purpose. She does say, however, that since the Second World War ". . . the only remnant of [the power to raise the *posse*] which has survived is the sheriff's duty to read the Riot Act in the now unlikely event of an insurrection against the Crown."

[244] Morris, *supra*, note 2 at 115-6.

[245] (1584) 4 Co. Rep. 32b, 76 E.R. 965, at E.R. 969.

[246] 28 & 29 Vict., c. 126.

[247] Churchill, *supra*, note 71 at 48.

On Vancouver Island, if not on the mainland as well, the sheriff at least for a time was given responsibility for jails.[248] Eventually, in 1897, a provision relieved the sheriff from liability for escapes from common jails,[249] over which, by then, he had no control. Thus the sheriff was a sometime jailer, as he was in other parts of Canada, and that is probably why vestigial references to that responsibility remain in federal legislation.

There are four such references, three of them in the *Criminal Code*.[250] Two of those relate to rights of election and re-election by accused persons. By section 490 of the *Code*, where an accused who is in custody elects under section 464 or 484 to be tried by a judge without a jury, "the sheriff or other person having custody of the accused" is required (at least by implication) to deliver to a judge having jurisdiction[251] a written notice "stating that the accused is in custody and setting out the nature of the charge against him." On receipt of the notice, the judge is required to fix a time and place for the trial of the accused. In practice in British Columbia, the notices are given by the warden of the place in which the accused is kept, and not by the sheriff.

By section 492 of the *Code*, the sheriff "in the territorial divison"[252] in which an accused is to be tried, must receive (again by implication) a notice given to him by an accused person who wants to re-elect his mode of trial, (and a consent from the Attorney General or his counsel if one is needed), and must then "forthwith inform a judge or magistrate having jurisdiction,"[253] who is then required to fix a time and place for the accused to re-elect. In British Columbia, when the accused is in custody, the sheriff commonly receives the notice and passes on the information. Where the accused is free, he usually appears in person, or his counsel will appear to make the arrangements.

Section 700 of the *Code* (once again by implication) requires the sheriff to deliver, to a judge, justice or magistrate who has made an order relieving a surety from his obligation and committing the accused to prison, a "certificate[254] that the person named in the order has been committed to prison." When the certificate is delivered, an entry of the committal on the recognizance must be ordered. Because endorsement of the entry discharges the surety, the sheriff's duty here is an important one.

It is appropriate that the sheriff continue to discharge these responsibilities under the *Code*, but it should be made clear that he does the work as officer of the court and not as officer of the Crown.

Finally, there is the *Statistics Act*.[255] By section 25, the sheriff is required, at the direction of the Minister to " . . . fill in and transmit the schedules he receives relating to the prisoners committed to any penitentiary, reformatory or gaol under his charge or within his jurisdiction." The last three words of the provision suggest that the sheriff is obligated to provide the information when asked to do so even though, as it is the case in British Columbia, the jails are under the control of others. That, and the fact that the sheriff never receives demands for statistics under the *Act*, is ample reason for striking his name from the provision.

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[248] *The Daily British Colonist*, for 18 January 1866 contains a report of legislative proceedings, at 3, under the heading "House of Assembly:"

> Mr. Duncan moved that the Sheriff be Governor of the Gaol, the present management he thought was very bad.
>
> . . .
>
> Mr. DeCosmos said the gaol was badly managed. Many prisoners had escaped. He approved of the motion and thought the gaoler ought to be Deputy Sheriff. Such was the custom in other places. The present system was bad, the Sheriff being made responsible for prisoners without holding the keys of gaol.
>
> The motion was carried, Dr. Helmcken and Dr. Ash dissenting.

[249] *Sheriffs Act*, R.S.B.C. 1897, c. 172, s. 24. This provision was borrowed from England, where it was undoubtedly enacted to reflect the change brought by the *Prisons Act, 1865*.

[250] R.S.C. 1979, c. C-34.

[251] "Judge" is defined in s. 482 (*e*) of the *Code* to mean: "in the Province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court, or a judge of a county court." Which judge has "jurisdiction" will be determined by the charge: *see, e.g.*, s. 427.

[252] "Territorial division" is defined in section 2 of the *Code* to include "any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies."

[253] Again, the jurisdiction of the judge or magistrate will depend on the charge.

[254] The *Code* makes no provision for a form of certificate.

[255] S.C. 1970-71-72, c. 15, *as am.* [French language version only] S.C. 1976-77, c. 28, s. 49.

(c) Customs Powers

It is not surprising to find, in a federal enactment, a requirement that the sheriff assist with the collection of revenues. Watson recorded in 1848[256] that, for that purpose, certain Crown processes issued to the sheriff "immediately on his entrance into office." These were:[257]

> 1st. The great roll of the pipe. 2ndly. The summons of the pipe. 3rdly. The summons of the green wax. 4thly. A process to levy on clergymen by name for arrears of tenths or first fruits. 5thly. A process, called the *mortuus* process, against the executors and administrators of deceased clergymen.

There were of course others, including the writ of extent. The point is simply that the sheriff was then a recognized collector of Crown revenue and had, in fact, always been one.[258] For centuries he had specific duties relating to customs. Thus, Morris reports that:[259]

> In 1278 the sheriff [of Devon] was ordered to collect the king's new custom on wool, woolfells and leather, and had authority to arrest persons carrying away and concealing the custom. . . . After the king in 1297 remitted the maltolt[260] on wool, he directed that the custom be collected henceforth at certain ports; and in 1299 all the sheriffs were ordered to obey and be intendant to the knight and collectors of the custom, appointed at each of these ports.[261]

Today, section 133 (1) of the *Customs Act*[262] provides that the sheriff, among other named people:

> . . . may, upon information, or upon reasonable grounds of suspicion, detain, open and examine any package suspected to contain prohibited property or smuggled goods, or goods respecting which there has been any violation of any of the requirements of this Act, and may go on board and enter any vessel or vehicle of any description whatever, and may stop and detain the same, whether arriving from places beyond or within the limits of Canada, and may rummage and search all parts thereof for such goods.

Thus, the sheriff need not only "be intendant." He is given the power to act of his own motion. That is a significant power. Subsection (2) empowers him (and the others) to "seize and secure any vessel or vehicle which they have boarded or entered and on or in which they have found the offending property or goods. "Prohibited property" is not defined in the Act. Nor is "smuggled goods." Knowledge of "goods respecting which there has been any violation" of the Act would require an intimate working of customs law,[263] so there is a great potential for error or confusion. In practice, the sheriff in British Columbia does not act under section 133 and has not acted under the provision within the recollection of any of the administrators and deputies contacted in sheriff services. The sheriff's name should be deleted from section 133.

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[256] Watson, *supra*, note 72 at 352.

[257] *Ibid.*

[258] *See, e.g.*, the passage from Gladwin, *supra*, note 199, which is quoted in Chapter II at note 8.

[259] Morris, *supra*, note 2 at 262.

[260] 1 *The Compact Edition of the Oxford English Dictionary* (1979) at 1705, col. 82 defines "maltolt" as: "An unjust or burdensome tax."

[261] Ironically, customs and excise commissioners are now exempt from serving as sheriffs: *see* C.H. Beaumont, *The Law Relating to Sheriffs and Their Officers* (1968) at 9.

[262] R.S.C. 1970, c. C-40.

(d) Election Duties

Historically, sheriffs in Canada had, or at least could have had, important responsibilities in connection with the election of members to serve in the House of Commons. For example, the sheriff's availability as returning officer is reflected in the *Dominion Elections Act* of 1906.[264] Custodial duties touching ballot boxes were also spelled out. These latter duties are the only remaining responsibilities for the sheriff so far as federal elections are concerned. Section 55 of the *Canada Elections Act*,[265] now requires the sheriff to "receive" ballot boxes when there is no building owned or occupied by the Government of Canada at the place at which the addition of votes at an election was held, and to give the returning officer a receipt for them. Section 30 (4) requires the sheriff, where ballot boxes have been left with him after an election, to deliver them to the "appropriate" returning officer when a new election is called.

In practice, the sheriff in British Columbia is never given the boxes. Repeal of these provisions is in order.

(e) The Power to Give Possession of Public Works

Section 22 (1) of the *Public Works Act*[266] provides that the "provisions and conditions" of an order in council granting public works to local authorities may extend to:

> (c) the vesting in any sheriff of power to give possession of such public work to any public officer for the Crown, on any warrant, under the hand and seal of the Governor General, addressed to such sheriff, . . . and commanding him to give possession to such officer of the Crown as aforesaid.

Notwithstanding the sheriff's suitability to undertake delivery of possession (as he does frequently on orders from the court), no recent use of this provision has apparently been made. Other Crown officers could usefully do any necessary work.

(f) Powers in Connection with Wrecks

It was probably because Edward I in 1275 linked sheriffs and wrecks[267] that the same link is found in the *Canada Shipping Act* today. The first Statute of Westminster had provided in part:[268]

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[263] *See, e.g.*, s. 8, which provides:

> (1) No goods shall be unladen from any vessel arriving at any port or place in Canada, from any place out of Canada, or from any vessel having dutiable goods on board brought coastwise, nor shall bulk be broken within three leagues of the coast, until due entry has been made of such goods, and warrant granted for their unlading.
>
> (2) No goods shall be so unladen, unless for the purpose of lightening the vessel in crossing over or getting free from a shoal, rock, bar or sand bank, except between sunrise and sunset, and on some day not being a Sunday or statutory holiday, and at some hour and place at which an officer is appointed to attend the unlading of goods, or at some place for which a sufferance has been granted by the collector or other proper officer, for the unlading of such goods, except that the collector or other proper officer at the port at which entry of the goods is to be made may give permission in writing for the lightening of a vessel and unlading of goods
>
> (a) on a statutory holiday other than a Sunday;
> (b) after sunset and before sunrise; and
> (c) at a place other than a port;
>
> but such unlading shall be done only in the presence of an officer detailed for such service and under such conditions and upon such terms as the Minister may authorize or prescribe.

[264] 63 & 64 Vict., c. 12, R.S.C. 1906, c. 6.

[265] R.S.C. 1970 (1st Supp.), c. 14.

[266] R.S.C. 1970, c. P-38.

[267] 3 Edw. I, Stat. West. I, c. 4 (1275).

[268] *Ibid.*

> Concerning Wrecks of the Sea, it is agreed, that where a Man, a Dog, or a Cat escape quick out of the Ship, that such Ship nor Barge, nor any Thing within them, shall be adjudged Wreck: but the goods shall be saved and kept by view of the Sheriff, Coroner, or the King's Bailiff, and delivered unto the Hands of such as are of the Crown, where the goods were found; so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a Year and a Day, they shall be restored to him without Delay; and if not, they shall remain to the King, and be seized by the Sheriffs, Coroners, and Bailiffs, and shall be delivered to them of the Town, which shall answer before the Justices of the Wreck belonging to the King.

The modern responsibility is even more extensive. The sheriff and other named officers are empowered (but are not required) to act, as section 498 of the *Canada Shipping Act*[269] makes clear:

> (1) When a receiver is not present any chief officer of customs, fishery officer, or stipendiary magistrate on board any vessel belonging to or in the service of the Government of Canada and employed in the service of protecting the fisheries, officer of customs, sheriff, justice of the peace, officer of the regular force of the Canadian Forces or lighthouse keeper employed by the Government of Canada, may do all matters and things by this Part authorized to be done by the receiver, for the preservation of vessels, shipwrecked persons and wreck.
>
> (2) Where any two or more of such officers or persons are present on any occasion, they shall respectively have priority in relation to any such act in the order in which they are named in this section.
>
> (3) Any officer or person so acting shall, in respect to any wreck the delivery of which to the receiver is by this Part required, be considered as the agent of the receiver, and shall place the wreck in the custody of the receiver, and that officer or person is not entitled to any fees payable to receivers, and is not deprived, by reason of his so acting, of any right to salvage to which he would otherwise be entitled.

The things authorized to be done by the receiver are set out in sections 490, 492 and 493 of the *Act*. These include the power, where:[270]

> . . . any British or foreign vessel is wrecked, stranded or in distress at any place within Canadian waters or on or near the coasts thereof, . . . [to] take command of all persons present and assign such duties and issue such directions to each person as he thinks fit for the preservation of such vessel and of the wreck and of the lives of shipwrecked persons.

This responsibility is an important one, for which the deputy sheriffs in this Province are not trained, except perhaps so far as they have first aid skills.

There is also a provision in the *Act*[271] entitling the receiver (read sheriff) to apprehend and to keep in custody (until he can be "conveniently" taken before a justice of the peace) "any person who plunders, creates disorder or obstructs the preservation of a stranded, wrecked or distressed vessel. Here the sheriff has both a historical[272] and practical claim to participation.[273]

These are significant powers and the time has passed for them to be in the sheriff's hands. It is improbable that there will ever be occasions when a receiver is not present[274] and, in any event, the other officers mentioned in section 498 are without exception better able, from the nature of their employments, to do the things contemplated. The sheriff is untrained and inexperienced in matters relating to the sea and it is unwise and uneconomical to educate him to do them. A facility with jetsam, flotsam, lagan and derelict[275] is too much to ask of a sheriff today.

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[269] R.S.C. 1970, c. S-9.

[270] *Ibid*. s. 490 (1).

[271] *Ibid*. s. 493.

[272] The power to raise the *posse comitatus* is one of ancient origin.

[273] One thing the deputy sheriffs in British Columbia are trained to do is to control people. It is obviously a necessary skill for escort responsibilities.

[274] Section 488 of the *Act* names people to act when there is no receiver and the sheriff is well down the list of potential actors in section 498.

Still, the powers are the sheriff's until they are taken from him. So one must ask whether he is entitled to share in "salvage"[276] (as section 498 (3) of the *Canada Shipping Act* would suggest) if he acts as the statute empowers him to do. It is a difficult question to answer. While there is no federal legislation which might disentitle him, in this Province, section 9 of the *Sheriff Act*[277] could. It denies the sheriff any reward "for performing or not performing his duties" except where an enactment permits payment. "Enactment" means a *provincial statute*, regulation or rule[278] — so the exception is no help. Section 498 (3) of the federal *Canada Shipping Act* is not enough in the face of the otherwise blanket proscription. It could be argued that "duties" means duties under provincial legislation, so that rewards for the performance of federal duties would be permitted. A difficulty with this argument is that "duties" is left unqualified in section 9. Elsewhere in the *Sheriff Act*, it is defined by the phrase "duties under this or any other enactment." One must assume that something different — all duties, whatever their source might be — was intended by the Legislature in section 9.

It might also be argued that no "duties" at all are imposed on the sheriff by the *Canada Shipping Act* — that he is only empowered, upon a request, to act. Once the sheriff begins to exercise the power, however, it may be said he *assumes* duties — for example, to take command of the people who may be present at a shipwreck.

Whatever the answer, there is no reason to allow salvage to public service sheriffs. So long as the question is open, however, it should be made clear whether or not they can claim salvage. If they do now (and a simple "demand" for reward is enough[279]), then they risk prosecution under the *Offence Act*.

(g) Temperance Duties

Sheriffs in England are still responsible, in some circumstances, for making royal proclamations. There is a long history of this activity. Morris[280] mentions the "quite familiar" practice of the sheriff making proclamations in the thirteenth century and Derriman[281] describes the "two ornate lamp-posts" fixed "outside the door of the sheriff's private house . . . used for 'posting' royal proclamations." It was, he said in 1955, "[a] curious custom, apparently extinct only recently if indeed it does not survive . . . ."

So it is not surprising to find in the *Canada Temperance Act*,[282] a provision (section 7) entitling people who move to bring Part II of the *Act* into force in British Columbia to deposit a copy of their petition "for public examination" in any land registry office or in any sheriff's office in the county or in the city to which it relates." It seems that the sheriff has no option but to post conspicuously a notice brought into him, however unlikely that event might be. And it is unlikely. No one recalls a sheriff ever having had to discharge the responsibility. The utility of the requirement is questionable. The sheriff's office is today a place to which the public comes infrequently. Lamp-posts have been replaced by the regular and familiar publication of the Gazettes. Together, these things make retention of the sheriff's duty under section 7 questionable.

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[275] All these things are included within the definition of "wreck" in s. 2 of the *Act* although jetsam, flotsam and lagan (or ligan) were different from "wreck" at common law: *see* 1 *Jowitt's Dictionary of English Law* (2nd ed.) at 1013. "Jetsam is where goods are cast in the sea and there sink and remain under water . . . ." (1 *Jowitt's* at 1013); "flotsam" or "floatsam" is "goods floating upon the sea, which belong to the Crown unless claimed by the true owners thereof within a year and a day" (1 *Jowitt's* at 805); "lagan" is "goods tied to a buoy and sunk in the sea" "in order to be found again" (2 *Jowitt's* at 1057 and 1 *Jowitt's* at 1013); and ships are ". . . said to be derelict when they are abandoned on the high seas. If the ship is salved, a greater amount of remuneration is frequently allowed to the salvers than in ordinary cases of salvage" (1 *Jowitt's* at 598, citing *The Cleopatra*, (1878) 3 P.D. 145).

[276] *In Canadian Pacific Navigation Co. v. The C.F. Sargent*, (1893) 3 B.C.R. (Pt. 1) 5 (V-Adm. Ct.), Begbie, L.J.A. said, at 7: ". . . If [the ship] were in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal; but which varies very much according to the imminence of the danger to the ship on one hand and the skill and enterprise and danger of the rescuers on the other hand."

[277] R.S.B.C. 1979, c. 386.

[278] *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 1.

[279] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 9 (1) (a).

[280] *Supra*, note 2 at 153.

[281] *Supra*, note 5 at 113.

[282] R.S.C. 1970, c. T-5.

Equally questionable is retention of the power conferred on the sheriff by section 13 of the *Canada Temperance Act* to act, when appointed, as returning officer for an election on a petition. While someone must be available to exercise this function, why should it not be those experienced people who act as returning officers and deputies when federal elections are called?

3. THE SHERIFF AS "PEACE OFFICER"

(a) The History

By common law in England, the sheriff was "keeper of the King's peace."[283] Thus in 1854, it was written[284] that he is:

> . . . a principal and special *conservator of the peace* in every place within his county; and hath committed unto him the custody of his county, for the time that he is Sheriff; and is to see the peace thereof kept and maintained; and, upon request to him made, he may command, and cause another to find sureties for the peace; and may take the same surety by *recognizance*. . . .
>
> . . . every Sheriff (by the common laws of this realm) may do, and is bound to do, his best endeavour for the conservation of the king's peace, and may and ought to pursue, apprehend, arrest, and imprison all traitors, murderers, robbers, and other felons, and all such other as do break, or go about to break or disturb the king's peace within his county . . . .

These duties were of the oldest kind. Both Morris[285] and Gladwin[286] mention the responsibilities in their discussions of the Anglo-Saxon sheriff. By the time of Edward I,[287] provision was made by statute:

> That all generally be ready and apparelled, at the Commandment and Summons of Sheriffs, and at the Cry of the Country, to sue and arrest felons, when any need is . . .

This was of course what is now popularly known as the sheriff's power "to raise the hue and cry"[288] and the force which responded to the call was known as the *posse comitatus*,[289] so familar now to students of television history. The existence of the hue and cry was confirmed by statute in England in 1887,[290] even though two years earlier Maitland had called it "rusty machinery."[291]

Like so much else, the statutory power to raise the hue and cry was imported into British Columbia in the Davie revision in 1897[292] and it was not removed from the *Sheriff's Act* until the implosion of 1976.[293] But despite the removal, the sheriff arguably retains the power (at least on the mainland[294] in this Province) because repeal of an enactment confirming the common law does not necessarily alter the common law. It continues to exist as it always has.[295] In the interest of settling once and for all any question there might be, the *Sheriff Act* should be amended to provide that the sheriff's power to raise the hue and cry or to call out the *posse* for the purpose of enforcing the criminal law is abolished.[296]

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[283] He was not the only one charged with the responsibility: *see* the discussion of the office of constable later in this section.

[284] *See* Atkinson, *supra*, note 71 at 105-6.

[285] *Supra*, note 2 at 28.

[286] *Supra*, note 199 at 29.

[287] 3 Edw. I, Stat. West I, c. 9 (1275).

[288] "There is some ground to think that *hue* as distinct from *cry* originally meant inarticulate sound, including that of a horn or trumpet as well as of the voice:" 1 *The Compact Edition of the Oxford English Dictionary* (1979), at 1343, col. 436.

[289] *See*, *e.g.*, Maitland, *Justice and Police* (1885) at 70.

[290] *Sheriffs Act*, *1887*, 50 & 51 Vict., c. 55, s. 8 (1).

[291] *Supra*, note 289 at 70: it was rusty because justices of the peace and police constables had rendered it needless.

[292] *Sheriffs Act*, R.S.B.C. 1897, c. 172, s. 20 (1).

[293] The *Sheriffs Act*, S.B.C. 1976, c. 50 seemed to represent an implosion of law and explosion of duties.

The suggested abolition of an ancient power whose time has passed, does not, however, imply that it is inappropriate for the sheriff in some circumstances to enjoy the protections accorded to "peace officers" by the *Criminal Code* or that the sheriff should not have the right to call for assistance when he acts as a court officer. Simply put, it is unnecessary that the sheriff should be a "peace officer" for all the purposes for which he now enjoys that status.

(b) The Statutes

Section 29 of the provincial *Interpretation Act*[297] defines "peace officer" to include:

> (a) a mayor, sheriff and sheriff's officer;
> (b) a warden, correctional officer, and any other officer or permanent employee of a penitentiary, prison or correctional centre; and;
> (c) a police officer, police constable, constable or other person employed for the preservation and maintenance of the public peace.

A recent count revealed 131 provisions in the Revised Statutes of British Columbia in which reference is made to a "peace officer." Most of the provisions give powers; some of them impose duties. In theory, the sheriff may exercise all the powers and must discharge all the duties, no matter what they might be. In fact, however, he does little work as a peace officer in the Province.[298]

The sheriff is not made a "peace officer" by the federal *Interpretation Act*,[299] although he is a "peace officer" for the purposes of the *Criminal Code*.[300] In that enactment "peace officer" includes:

> (a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace;
> (b) a warden, deputy warden, instructer, keeper, gaoler, guard and any other officer or permanent employee of a prison,
> (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process . . . .

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[294] *See* the discussion of special problems relating to the reception of English law earlier in this Chapter.

[295] *See, e.g., Surtees* v. *Ellison*, (1829) 9 B & C 750, 109 E.R. 278, *per* Lord Tenterden C.J., at 279: "It has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule . . . ." *And see Simpson* v. *Ready*, (1843) 11 M & W 344, 152 E.R. 836 *per* Parke B, at 837, to the same effect. Section 35 (a) of the *Interpretation Act* does not operate. Because s. 20 (1) of the *Sheriffs Act*, R.S.B.C. 1897, c. 172 confirmed the common law, there was a "thing in force or existing immediately before the time when the repeal takes effect." One might support this argument by asking: what would the law be if the *Sale of Goods Act* or the *Criminal Code* was repealed? There is no doubt that the common law would fill the gap. The Legislature in British Columbia seems to be aware of the problem and seems to know what to do when it wants to ensure that the common law is abolished: *see, e.g.*, s. 60 (1) of the *Coroners Act*, R.S.B.C. 1979, c. 68 [not yet proclaimed] which provides: "The common law as it relates to the functions, powers and duties of coroners within British Columbia is repealed."

[296] England tried to do it in 1967 but the legislators there do not seem to have been any more successful than they have been in British Columbia: *see* the *Criminal Law Act 1967*, 15 & 16 Eliz. II, c. 58, Schedule 3, Part III. According to Beaumont, *supra*, note 261 at 106, the sheriff in England still has the duty to suppress riots (even though 1 Geo. 1 St. 2, c. 5 was repealed by the same Part of the same Schedule of the same *Criminal Law Act 1967*) and "to defend his country against invasion." For both purposes he has the right and responsibility to raise the *posse comitatus*. That is clear from *The King* v. *Lydford*, [1914] 2 K.B. 378 (C.C.A.) in which it was held that the *Sheriffs Act, 1887* 50 & 51 Vict., c. 55". . . is by no means exhaustive of the duties and powers of the sheriff." (*per* Lord Reading C.J. at 385, Darling and Channell JJ. concurring.)

[297] R.S.B.C. 1979, c. 206.

[298] It is difficult to estimate, but from the statistics available for the second quarter of 1980, it appears that "peace officer" duties took about 5% of the total time spent by sheriff services at its work. Almost all that time was devoted to the seizure of motor vehicle driver licences and licence plates. *See* the discussion of that "responsibility" later in this Chapter.

[299] R.S.C. 1970, c. I-23.

[300] R.S.C. 1970, c. C-34, s. 2.

One reason, undoubtedly, that the sheriff was designated a peace officer under the *Criminal Code* was to give him the benefit of section 118. It provides in part:

> Everyone who
> (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,
> . . .
> (c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,
> is guilty of
> (d) an indictable offence and is liable to imprisonment for two years, or
> (e) an offence punishable on summary conviction.

What amounts to resistance or wilful obstruction? The authorities are illuminating and there are no real surprises. For instance, in *Regina* v. *Fritz*[301] (an appeal by way of stated case) where deputy sheriffs had seized a truck on a warrant of execution, the accused had (in the words of the judge at trial):

> . . . attempted to drive off in said seized truck and was stopped and ordered out of the truck after he had damaged the Sheriff's vehicle by backing into it. Shortly after the accused attempted again to get into the truck and when stopped by the said deputies became very abusive, using obscene language and saying he owned a gun and would shoot them, and had to be physically prevented from getting into the seized truck, during which incident he struggled with Deputy Sheriff Rivard.

There was "no doubt," said Ruttan J.,[302] that Rivard had been obstructed, although it is not clear whether the obstruction lay in the threat or in the battery. *Rex* v. *Stuart*[303] would support the battery theory. There the accused had told a bailiff to "Get out of here" (that was the extent of the verbal abuse), but had struck him three times. On the other hand, in the case of a Horsefly man, *Gilbert Walters*,[304] reported in the *Williams Lake (British Columbia) Tribune* for 18 November 1980, the threat — "I'll kill you if you take my trucks" — was enough. It is even possible for silence to amount to an obstruction. In *Moore* v. *The Queen*,[305] a cyclist was convicted on a charge under section 118 (a) where he had refused to give his identity to a policeman when he was stopped for violating a provincial traffic offence, even though he broke no provincial law in the refusal.

Would *Moore* apply to a prosecution under section 118 (c)? It seems wrong that someone who stands mute in what is nothing more than a civil case should be visited with criminal penalties. The better view is that section 118 (c) is the provision under which a prosecution for obstruction of deputy sheriff making a seizure should be brought even though the charge in the *Fritz* case [306] was under section 118 (a). The charge in that case seems to be one of the unfortunate consequences of the broad brush approach to "peace officer."

This conclusion does not mean that section 118 (a) serves no useful purpose so far as sheriffs are concerned. It does. It can be used, for instance, (where section 118 (c) would not do the job) when a deputy is obstructed in the execution of a warrant issued under Rule 56 of the Rules of Court, by which he is commanded to bring an alleged contemnor before a judge.[307]

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[301] (1978) 6 B.C.L.R. 314 (S.C.).

[302] *Ibid.* at 315.

[303] [1946] 1 W.W.R. 37 (Sask. C.A.). An assault is enough, even if it does not prevent the officer from doing his duty: *see R.* v. *Tortolano et al.* (1975) 28 C.C.C. (2d) 562 (Ont. C.A.).

[304] A decision of His Honour Judge Barnett in the Provincial Court of British Columbia.

[305] [1979] 1 S.C.R. 195. *But see R.* v. *Stortini*, (1978) 42 C.C.C. (2d) 214 (Ont. Prov. Ct.) where it was said that passive resistance with nothing else was not "resistance" within the meaning of the section.

[306] *Supra*, note 301 at 314-5.

[307] In any event, resisters who might face prosecution under section 118 (a) or (c) are also liable to committal for contempt where the sheriff is executing a court order.

(c) The Practice

(i) *Provincial Legislation*

While the potential for using the sheriff as a "peace officer" is great in British Columbia, not much use in fact is made. A discussion of all the powers is beyond the scope of this paper. That might be the subject of a wider inquiry into the law relating to police constables. While the sheriff could (because he is a peace officer), he does not in practice, make what are called "initial arrests."[308] In other words, the sheriff does not arrest people for alleged offences under the *Criminal Code* or under the *Offence Act*[309] except, perhaps, where the offence has been committed in the sight of a deputy. By an understanding reached between sheriff services and police authorities,[310] those arrests have been reserved for police constables. In short, the sheriff does not, in practice, patrol the streets to enforce the criminal law.

This discrepancy between the legal powers, and the powers exercised in practice, is more evidence of the unsatisfactory broad approach. The agreement mentioned above shows clearly that section 2 of the *Criminal Code* does too much when it makes the sheriff a "peace officer" for all purposes. The agreement shows that it is not necessary and in fact that it is undesirable that the sheriff have the powers of arrest that police constables have. A more satisfactory approach would be to provide that a sheriff has no more right than a private citizen to make an arrest. A provision to that effect would not take from the sheriff powers that he needs to do his work. He is not engaged in crime prevention or in the investigation of crime and needs no more than the power section 449 (1) gives to any private citizen — the right, without a warrant, to arrest any person he finds committing an indictable offence.

(ii) *The Coroners Act*

In British Columbia, any peace officer can be appointed by a coroner under section 51 (4) of the *Coroners Act*[311] "for the purpose of assisting him in an inquest."[312] In practice, at least in most parts of the Province, the sheriff is the peace officer who is asked to do the work,[313] although he is not formally appointed to do it.

The sheriff's involvement usually begins when he receives, from the coroner, a precept commanding him "immediately upon sight hereof" to summon a jury of six people to inquire into a death.[314] While it is the coroner's duty under section 22 to summon the jury, in practice the sheriff has a major role. For example, the decisions about who to summon are ordinarily left to him.[315] The qualifications and exemptions for which provision is made by the

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[308] These are arrests made with warrant under various provisions of the *Criminal Code*, R.S.C. 1970, c. C-34. These arrests should not be confused with those the sheriff is empowered to make by judge's order, *e.g.*, under s. 707 of the *Code* or under Rules 42 (34) or 56 of the Rules of Court, where the sheriff is the proper executing officer

[309] R.S.B.C. 1979, c. 305.

[310] For example, in a letter dated 1 October 1974 from the director of sheriff services to the commanding officer of "E" Division of the Royal Canadian Mounted Police (Victoria), it was said: "It was not intended that Deputy Sheriffs would execute Warrants to Arrest in the first instance as it is considered that this particular function is that of the police." It has always been understood that deputy sheriffs would not make arrests without warrant. But for the understanding, they could make these arrests by the authority of section 450 of the *Criminal Code*.

[311] R.S.B.C. 1979, c. 68.

[312] To ensure that there is no confusion about when a peace officer may be called in to assist the coroner, the word "with" might be substituted for the word "in" in s. 51 (4).

[313] *E.g.*, Vancouver, Victoria, Prince George and Kelowna. In Campbell River, the sheriff does not summon the jury, but does attend inquests to keep order.

[314] There is no statutory form for the precept. In fact, there is no statutory authorization for a precept at all. There is nothing in the *Coroners Act*, R.S.B.C. 1979, c. 68 which requires the sheriff to act "immediately."

[315] The sheriff usually only receives direction from the coroner about who to summon when the death for which the inquest is being held is the death of a worker to whom Part I of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 applies: *see* s. 30 (6) of the *Coroners Act*, R.S.B.C. 1979, c. 68. In those cases, the coroner will ask the sheriff to summon a jury "composed, wholly or in part, of persons familiar with the type of work the deceased was doing." The deputies have been instructed, when an inquest is ordered relating to the death of a prisoner within a prison, not to summon as a juror "an officer of the prison or person engaged in any sort of trade dealing with the prison": *see* Ministry of the Attorney-General, *Sheriff Services Operating Manual* (1979), chapter 7, page 21.

Jury Act[316] apply to coroner's inquests.[317] However, in practice, the deputies sometimes give less than proper attention to the provisions. The procedure under the *Coroners Act* is to be contrasted with the requirements for summoning jurors for civil actions and criminal trials. There, it appears that the duty to summon rests with the sheriff,[318] and he discharges it without delegation. For inquests the sheriff is a mere servant. He need do nothing but, and must do nothing more, than that which the coroner lawfully directs him to do.

Under section 30 (5) of the *Coroners Act*, the coroner may, where fewer than five of the people initially summoned as jurors fail to appear for an inquest, require the sheriff to summon others to make up the deficiency. Commonly, that is done by the sheriff searching the streets near the place where the inquest is being held and requiring those he finds to accompany him into the presence of the coroner. It is possible that the sheriff, as a peace officer, may use "as much force as is necessary" to get recalcitrant jurors to obey him,[319] and those who resist may fall afoul of section 118 (a) of the *Criminal Code*. The same power and the same penalty are also available should the coroner issue a warrant to the sheriff[320] requiring him to arrest jurors who have failed to appear. A common practice, at least in Victoria, is for the coroner to fine the defaulters $25.00 and to direct the sheriff to summon as many more people as are needed.

When an inquest commences, the sheriff will ordinarily address the jury in words to this effect:

> Ladies and gentlemen, you are summoned here this day to inquire into and determine for our Sovereign Lady the Queen the identify of the deceased, when, where, how and by what means the deceased came to his death.

Afterward, the coroner ordinarily asks the sheriff:

> Did you summon the jury here present and do you find them to be free of conflict, interest or bias and do you find them to be qualified as jurors in every respect to the best of your knowledge?

By section 45 (1), the coroner may, and in practice does, designate the sheriff to take charge of the jury when it retires to consider its verdict.[321] Once the jury has retired:[322]

> (a) no person other than the person who has charge of them shall be permitted to speak or to communicate in any way with any of the jurors without the leave of the coroner; and
>
> (b) the person in charge shall in no event speak to or communicate with any of the jurors in relation to the subject matter of the inquest.

It does not appear that the sheriff is liable to any penalty should someone speak to a juror in contravention of section 45 (1) (a). It is clear, however, if the sheriff himself is the offender, that he will be liable to punishment by the operation of section 5 of the *Offence Act*.[323]

Section 51 of the *Coroners Act* provides:

> (1) Every coroner has the same power and authority to preserve order at an inquest as may be exercised by a judge of the Supreme Court during a sitting of that court.

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[316] R.S.B.C. 1979, c. 210.

[317] *Coroners Act*, R.S.B.C. 1979, c. 68, s. 31. For the method by which coroners juries are empanelled in England, *see Report of the Departmental [Morris] Committee on Jury Service* at 130 (1965) Cmnd. 2627.

[318] *The Jury Act*, R.S.B.C. 1979, c. 210 does not expressly impose the duty, but the sheriff is the only officer mentioned in the statute. *See* the discussion of the sheriff's work in summoning juries in Chapter VIII.

[319] On the assumption that he is engaged in the "administration" of the law: *see* s. 25 (1) of the *Criminal Code*, R.S.C. 1970, c. C-34.

[320] There is no statutory form of warrant.

[321] He also does that in ordinary civil actions and in criminal trials.

[322] *Coroners Act*, R.S.B.C. 1979, c. 68, s. 45. This provision is not an idle one. As pointed out in Chapter VIII, sometimes sheriffs in charge of juries in criminal trials say things to the jurors that should not be said.

[323] R.S.B.C. 1979, c. 305.

> (2) A coroner may make the orders or give the directions at an inquest he considers necessary to maintain order and to prevent abuse of the inquest process. If any person disobeys or fails to comply with an order or direction of the coroner, he may call for the assistance of any peace officer to enforce the order or direction.
>
> (3) Every peace officer called on shall take any action that is necessary to enforce the order or direction and may use force as is reasonably required for that purpose.

Much of this provision is probably unnecessary, at least as long as the sheriff is the "peace officer" to whom the coroner goes for assistance, owing to the breadth of subsection (1). The power and authority conferred on the coroner must carry with it the power to enforce any order that he might make. Because a judge of the Supreme Court can call on the sheriff for that purpose, even if the sheriff is not named by statute as the enforcement officer,[324] it is likely that the coroner can as well, even without subsection (2). It follows, for the same reason, that subsection (3) is superfluous: the sheriff has that obligation anyway at common law where a judge has ordered him to do or not to do something,[325] and the duty to act includes the power to use reasonable force.[326]

There is no reason why anyone other than the sheriff need be or should be available to assist the coroner in connection with inquests. Not only does the sheriff have the skills, but he does the work most of the time, and (so the theory goes) the work is not work for which policemen should normally be used.[327] Thus, the *Coroner's Act* might be amended so far as it is necessary to designate the sheriff as the primary official to whom the coroner should look for assistance. In order to ensure that the sheriff has sufficient protection (for example, if he needs to wrestle a reluctant talesman) provision can be made for the application of force that is reasonable in the circumstances.

Leaving this work with the sheriff should do no harm to the recommendation that the sheriff cease to be a Crown officer so long as either the *Coroner's Act* or the *Sheriff Act* provides clearly whose officer he is and what responsibilities he must discharge.

(iii) *The Motor Vehicle Act*

Several provisions of the *Motor Vehicle Act*[328] authorize a "peace officer" to make a seizure in furtherance of the objects of the statute. Thus, peace officers — specifically policemen — can, and in practice do, make seizures under sections 12, 18 and 58. But under section 83 (9), sheriffs do the work. That section provides:

> When a person fails to comply with subsection (8) [by delivering his licence permit, consent, certificate, windshield sticker or any corresponding number plates to the superintendent of motor vehicles when a notice of suspension or cancellation of a licence, permit consent or certificate has been given] the superintendent may order a peace officer to recover the licence, permit, consent, certificate, windshield sticker or any corresponding number plates.

This section is used primarily to enforce payment of insurance premiums. The Insurance Corporation of British Columbia pays the Ministry of Attorney

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[324] *See The King* v. *Lydford*, *supra*, note 296 at 383. The Law Reform Commissioners of South Australia have said in their *Fifty-Fourth Report* that they do not think that the law stated in *Lydford* is the law in South Australia because the case was decided after their reception date. However, *Lydford* seems to state law that was recognized at least as early as the sixteenth century: *see*, *e.g.*, the annotation to *Mitton's Case*, *supra*, note 245 at E.R. 970.

[325] He is liable to be fined or committed for contempt if he does not obey: *see*, *e.g.*, *In re The Sheriff of Surrey*, (1860) 2 F. & F. 236, 175 E.R. 1039 and *see* the discussion of the sheriff and contempt in Chapter VI.

[326] *See*, *e.g.*, *Park* v. *Evans*, (1616) Hob. 62, 80 E.R. 211 (St. Ch.).

[327] Strangely, the coroner's own officers and police constables are called on to make seizures under s. 16 (2) of the *Coroners Act*, R.S.B.C. 1979, c. 68. The former chief coroner wrote to say that deputy sheriffs are not used because they do not have the required "special knowledge of powers and privileges under the Act" or of "certain documents such as medical records."

[328] R.S.B.C. 1979, c. 288, as am. S.B.C. 1982, c. 36.

General about $150,000.00 a year in order to reimburse the Ministry for the services of deputy sheriffs who are ordered daily by the superintendent to make seizures where driving privileges have been suspended or cancelled.[329] The sheriff makes the seizures because the number of seizures is so large. Other peace officers, including policemen, are not employed because it is believed that their time is better spent discharging other duties.

A forceful argument can be made that every one of this great volume of seizures is unlawful and that each of them exposes the deputies who make them to civil actions for trespass and possibly to criminal proceedings for theft. The problem lies with section 1 of the *Motor Vehicle Act*. It defines "peace officer" to mean — not to include — "a constable or a person having a constable's powers." This definition is narrower than the definition of peace officer in section 29 of the *Interpretation Act*.[330] That *Act* does not define "constable" and its definition of "peace officer" does not apply to the *Motor Vehicle Act* because section 1 of that *Act* is proof of the "contrary intention" to which reference is made in section 2 (1) of the *Interpretation Act*, which provides:

> Every provision of this Act extends and applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

The question becomes this: is the sheriff a constable or is he a person having a constable's powers? The answer seems to be no.

There is no doubt that at common law sheriffs and constables were different people and that they did different things, although in some cases (the clearest example is the duty to keep the King's peace[331]) some of the means they used and some of the ends they were required to seek were the same.[332] There are modern analogies which can be used to explain this point: ophthalmologist and optician; architect and building technologist; lawyer and notary public; chartered accountant and certified general accountant. For sheriffs and constables, what must be noticed is that during the Middle Ages the "superior" officer — the sheriff — diminished in stature[333] as the "inferior" officer — the constable — grew. The sheriff now has "scattered fragments of powers that once were vast;"[334] the constable has become "a large body of policeman, highly organized on a military plan."[335]

That in times past the sheriff and the constable were different people who exercised different powers seems indisputable. For one thing, the offices of sheriff and constable evolved in different ways. It has been described how, in England, the sheriff in each county before and after the Conquest was the King's officer whose authority came from the King and from no one else. That was not the case with the constable. He was, at least originally, "the representative of [a] local self-governing body."[336] Thus, "[t]he nearest equivalent to the modern policeman is the Saxon tythingman, otherwise borsholder or headborough."[337]

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[329] This information was provided by P.K. Jackman, deputy superintendent of motor vehicles for British Columbia.

[330] R.S.B.C. 1979, c. 206.

[331] *See* text at note 283 and *see* W. Lambarde, *The Duties of Constables, Borsholders, Tithingmen, and such other low Ministers of the Peace* (1583), at 11, and *Anon.* (1593) Poph. 12, at 13: ". . . a Constable is one of the most ancient Officers in the Realm for the Conservation of the Peace, and by his Office he is a Conservator of the Peace." *See also* 1 Bl. Comm. 356 and W. Hawkins, *A Treatise of the Pleas of the Crown* (1762) at 33.

[332] *See, e.g.*, 11 Hen. IV, c. 4 (1403), which prohibited game playing in favour of the practice of archery. The prohibition was to be enforced by "the mayors and sheriffs, or the mayors and bailiffs of cities and boroughs" and by "the constables in other towns." The statute is mentioned in H.B. Simpson, "The Office of Constable" (1895) 10 Eng. Hist. Rev. 625, at 637.

[333] The growth in stature ended about the sixteenth century: *see* T.A. Critchley, *A History of Police in England and Wales* (2nd ed., 1972) at 29. The stature was diminishing by the eighteenth century: *see* C.K. Allen, *The Queen's Peace* (1953) at 94-6 and G. Marshall, *Police and Government. The Status and Accountablility of the English Constable* (1965) at 24.

[334] Maitland, *supra*, note 289 at 70.

[335] *Ibid.* at 105.

The origins of the office of constable have been described this way:[338]

> From very early times, certainly from the reign of King Alfred,[339] the primary responsibility for maintaining the King's peace fell upon each locality under a well-understood principle of social obligation, or collective security. . . . Every male person, unless excused through high social position or property, was enrolled for police purposes in a group of about ten families known as a tything and headed by a tythingman. If any member of the group committed a crime, the others had to produce him for trial; if they failed to do so they could be fined or called upon to make compensation. In addition, all members of the tything had to find a security who would appear to answer any charge preferred against them. In essence, therefore, the system relied on the principle that all members of a community accepted an obligation for the good behaviour of each other. Groups of tythings were formed into a hundred, the headman of which was known as a hundred man or royal reeve, who exercised administrative and judicial powers through a hundred court; and overall, the shire reeve, or sheriff, had a general responsibility under the King for the conservancy of the peace in the shire. He was thus able to muster the *posse comitatus* — namely, the whole available civil force of the shire — in case of emergency. Linked with these arrangments was an obligation on all members of a community to join in pursuit of a felon by means of hue and cry.

Thus, ultimate responsibility lay with the sheriff.[340] And for present purposes, it is enough to say that he could not at the same time be the constable — the officer he was required to superintend[341] — any more than the constable could be the sheriff.

Simpson brings the story of the constable into the thirteenth century; his work confirms the account quoted above and emphasizes the point that the growth of the office of constable was independent of the development of the office of sheriff. In fact, as mentioned, the sheriff was declining in power by the time the constable was gaining his:[342]

> The first of the published documents in which the constable [by that name] makes his appearance is the writ of 1252, published in Stubbs's 'Select Charters, 7th ed. p. 371'. There it is provided that in each township (*in singulis villatis*) one constable or two, according to its population, should be appointed, (*constituatur*), and in each hundred one chief constable (*capitalis constabularis*), who were to have special care for the view of arms and for the preservation of peace. They were given for this purpose equal authority with the mayors or the bailiffs or *praepositi* of boroughs, and were specifically responsible for the proper carrying out of the hue and cry. The writ merely enforced and elaborated earlier provisions of the law. Thus the provisions for the hue and cry are similar to those indicated in the Ordinance of the Hundred of Edgar's time,[343] in accordance with which the tithing men were to be summoned by the hundred men for the pursuit of a thief . . . .

The constable, " . . . in his heyday . . . exercised swinging powers and bore formidable responsibilities. He was probably at his most active under the Tudors, when . . . he became the henchman of the Justices of the Peace in a host of minor disciplines."[344] This is further evidence of the historical separation of the persons and functions of constables and sheriffs. That separation was described clearly in 1705 in the case of *Regina* v. *Wyatt*,[345] where Powell J. said:

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[336] Simpson, *supra*, note 332 at 638. There was over time a fusion of local and royal authority: *see* H. Cam, *The Hundred and the Hundred Rolls* (1930) at 193.

[337] Critchley, *supra*, note 333 at 1. Lambarde, *supra*, note 331 at 10-1, groups together "Constables, Petieconstables, Tythingmen, Borsholders, Borowheades, Headborrowes, Thirdborowes, chiefe pledges, and suche like ministers."

[338] Critchley, *supra*, note 333 at 2-3.

[339] He reigned from 871 to 899: *see* G.S.P. Freeman-Grenville, *The Queen's Lineage* (1977) at 5.

[340] The sheriff may have had ultimate responsibility, but he did not have absolute control over the constable: *see* Marshall, *supra*, note 333 at 24-5.

[341] In *The Use of the Law* (1639), Sir Francis Bacon said, at 4, that there were ". . . Petty Constables one in every Village, they were in ancient time all appointed by the Sheriffe of the Shire yearly in his Court called the Sheriffes Tourne. . . ."

[342] *Supra*, note 332 at 630.

[343] He reigned from 959 to 975, Freeman-Grenville, *supra*, note 339 at 5.

> . . . ever since justices of the peace have been erected, constables have been their officers, and constant experience is so. Secondly, justices of peace cannot command the sheriff, unless power is given them so to do in the Act of Parliament. . . . And so [constables] are officers of the peace, and officers to the justices of peace, where no particular officer is named.

On the other hand, the sheriff was known (at least as early as 1597) as "immediate officer to the King's courts,"[346] so that in 1786 Impey could say that the sheriff "is the same officer to the court of king's bench, as the constable is to the justices of the peace."[347] No one thought them to hold the same office; no one attributed the same powers to them.

Nor could it be said in more recent times that the sheriff was a constable or that he was a person exercising a constable's powers. If anything, the establishment in England of a Metropolitan police force in 1829[348] and of county and borough forces before 1840,[349] emphasized the division between the offices. These steps brought professional police services into being and put an end to any control which the sheriff still exercised over the constabulary.[350] He was left primarily to be court officer while the new forces, children of the constable, assumed responsibility for policing — for "the maintenance of good order, [and] the prevention or detection of offences."[351]

Further support for the conclusion that the sheriff is not a constable and does not have a constable's powers can be found in the apparent intention of the Legislature itself. Consider, for example, the definition of "peace officer" in section 29 of the *Interpretation Act*.[352] Three classes of "peace officer" are created there. One consists of mayors and sheriffs, the second, of prison officials, and the third (including police officers, police constables and constables) of people "employed for the preservation and maintenance of the public peace." Not only is the sheriff not categorized as "constable," but he is divorced from those "others" whose job it is to conserve the peace. Moreover, section 20 of the *County Court Act*[353] provides that a sheriff "shall exercise the authority of a constable." Obviously that direction would not be necessary if the sheriff were thought to be a constable or if it was thought that he had the use of a constable's powers.

If the sheriff is to be court and not Crown officer, then police or other Crown officers should make the seizures sanctioned by section 83 (9) of the *Motor Vehicle Act*. But if the sheriff is to be anyone's officer and if the economies persist which result in the use of sheriffs to seize things under section 107, then the proper amendment should be made to section 1 of the *Motor Vehicle Act*.

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[344] Allen, *supra*, note 333 at 94.

[345] (1705) 2 Ld. Raymd. 1189, 92 E.R. 286 at 288.

[346] *See, e.g.*, the annotation to *Mitton's Case*, *supra*, note 245 at E.R. 970.

[347] *Supra*, note 73 at 55.

[348] Maitland, *supra*, note 289 at 108.

[349] *Ibid*. at 109.

[350] *Ibid*. at 80.

[351] *Ibid*. at 105, n. 1.

[352] R.S.B.C. 1979, c. 206.

[353] R.S.B.C. 1979, c. 72.

(iv) *The Prevention of Cruelty to Animals Act*

The head note for section 9 of the *Prevention of Cruelty to Animals Act*[354] reads "Aid by police." But notwithstanding this reference, the section itself provides:

> Every peace officer shall aid and assist the authorized agents of the society in enforcing this or any other law relating to the prevention of cruelty to animals.

Despite some historical connection with animals — for example, Henry III's bear mentioned in Chapter II — the modern English sheriff has little to do with them. As indicated below, the sheriff in British Columbia is not looked to for help under the Act. This provision is another example of the consequences which result from calling the sheriff a "peace officer" for all purposes.

(v) *The Small Claim Act*

Section 51 of the *Small Claim Act*[355] requires all peace officers "within their respective jurisdictions" to "aid in the execution of every order or warrant" issued by a judge under the *Act*. In practice, the sheriff is the officer to whom the orders or warrants are directed. But he is already, by section 5 of the *Sheriff Act*, an officer of all the courts in the Province and in that capacity already has the obligation which the *Small Claim Act* imposes. So as long as the sheriff is the executive officer of the Small Claim Division,[356] that part of section 51 quoted is unnecessary.

C. The Demand for the Sheriff's Services

It seemed possible, bearing in mind the sheriff's responsibility to execute the courts' writs by making seizures, and the experience accumulated in discharging that duty, that the sheriff might be the proper officer to make seizures on behalf of the Crown and certain other bodies where the power to seize for certain purposes is given by statute. There is a long list of these statutes,[357] some of which name an officer who is authorized to seize, and others which permit the named officer to delegate the work of seizing to someone of his choice. To the end of determining whether the sheriff could usefully be employed to make these seizures — in other words, to gauge demand — a large number of corporations, societies, colleges, offices and Provincial government ministries[358] were surveyed. They were asked, among other things, who made seizures under their statutes and whether they thought the sheriff could be any help to them. Many bodies replied saying that they used their own officers; others said they used the police; in rarer cases[359] respondents indicated that deputy sheriffs were called in.

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[354] R.S.B.C. 1979, c. 335.

[355] R.S.B.C. 1979, c. 387.

[356] Of the Provincial Court of British Columbia: *see* s. 1 of the *Small Claim Act ibid.*

[357] They include: *Coal Act*, R.S.B.C. 1979, c. 51, s. 30; *Company Clauses Act*, R.S.B.C. 1979, c. 60, s. 191; *Coroners Act*, R.S.B.C. 1979, c. 68, s. 16; *Creston Valley Wildlife Act*, R.S.B.C. 1979, c. 82, s. 17 (5); *Utilities Commission Act*, S.B.C. 1980, c. 60, s. 109; *Gasoline (Coloured) Tax Act*, R.S.B.C. 1979, c. 151, s. 29; *Health Act*, R.S.B.C. 1979, c. 161, s. 61; *Income Tax Act*, R.S.B.C. 1979, c. 190, s. 42 (under the direction of Revenue Canada Taxation by agreement with the Province); *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237, ss. 67, 68, 69; *Mineral Land Tax Act*, R.S.B.C. 1979, c. 260, s. 8; *Natural Products Marketing (B.C.) Act*, R.S.B.C., 1979, c. 296, ss. 13 (1) (j) and 18 (2); *Offence Act*, R.S.B.C. 1979, c. 305, s. 17; *Park Act*, R.S.B.C. 1979, c. 309, s. 21; *Pesticide Control Act*, R.S.B.C. 1979, c. 322, s. 10; *Petroleum and Natural Gas Act*, R.S.B.C. 1979, c. 323, s. 125; *Pharmacists Act*, R.S.B.C. 1979, c. 326, s. 52; *Prevention of Cruelty to Animals Act*, R.S.B.C. 1979, c. 335, s. 12 (1); *Pyramid Distribution Act*, R.S.B.C. 1979, c. 351, s. 6; *Railway Act*, R.S.B.C. 1979, c. 354, s. 246; *Rent Distress Act*, R.S.B.C. 1979, c. 362, s. 16; *Residential Tenancy Act*, R.S.B.C. 1979, c. 365, s. 49; *Securities Act*, R.S.B.C. 1979, c. 380, s. 22; *Veterinary Laboratory Act*, R.S.B.C. 1979, c. 424, s. 5.

[358] Responses were received from:
British Columbia Hydro and Power Authority
British Columbia Society for the Prevention of Cruelty to Animals
College of Pharmacists of British Columbia
Creston Valley Wildlife Management Area
Office of the Rentalsman
Revenue Canada Taxation
City of Victoria

Most, but not all,[360] of those who answered questioned the ability of sheriff services to meet the particular problems their statutes presented. Three kinds of concerns — competence, availability and efficiency — were expressed. The secretary-manager of the British Columbia Society for the Prevention of Cruelty to Animals put it this way:

> . . . whilst we would welcome the chance to use specially trained deputy sheriffs, over the period of the last 25 years the system that is now employed has stood the test of time, that local police officers are well informed of the ramifications of the *S.P.C.A. Act*, and in addition, are very proficient in their dealings in this area, that I would have to truthfully say that the use of trained deputy sheriffs would be superfluous. In addition, it should be recognized that the requirements are, at any time of the day or night, 365 days of the year, which would provide a staffing problem from a trained deputy sheriff. To illustrate this particular point, in 1961, the Vancouver Regional Branch found it necessary to seize a dog at 10:30 p.m. on Christmas night. The police are always on duty, their response was immediate.

The deputy general manager of the Liquor Control and Licensing Branch of the Ministry of Consumer and Corporate Affairs, which has its own inspectors and leaves seizure to the police, who do it in the ordinary course of their duties, wrote:

> . . . I would suggest that it makes sense for the seizures to be handled in the way in which they are accomplished now. There ought not to be a need to involve the sheriff's office. The only type of situation which comes to mind where the sheriff's office might be of assistance would be in occurrences such as we are seeing during the beer strike. There has been the odd instance where licensees have been obtaining beer from 'illegal' sources and our Inspectors have attended at the premises with the police. In these cases, our Inspectors are there to point out the illegal product so that it may be seized by the police and charges laid. I suppose it is possible that sheriff's office personnel could be substituted for the police in these cases, but it is complicated in that the original report on the beer has probably come from observations made by the police when doing their patrols throughout the particular area.

The lack of any significant demand for the assistance of the sheriff and the apparent satisfaction with current practices expressed by the bodies with the power to seize suggest that there is no reason to add what would in effect be new Crown duties to those responsibilities the sheriff now bears.

Ministry of Agriculture (Field Operations)
Ministry of Agriculture (Veterinary Branch)
Ministry of Attorney General (Office of the Coroner)
Ministry of Attorney General (Office of the Fire Commissioner)
Ministry of Consumer and Corporate Affairs (Superintendent of Brokers, Insurance and Real Estate)
Ministry of Environment (Conservation Officer Service)
Ministry of Environment (Marine Resources Branch)
Ministry of Environment (Pesticide Control Branch)
Ministry of Energy, Mines and Petroleum Resources (Mineral Resources Branch)
Ministry of Forests
Ministry of Health
Ministry of Lands, Parks and Housing (Parks and Outdoor Recreation Division)
Ministry of Transportation and Highways (Motor Vehicle Branch)

[359] Deputy sheriffs were used for seizures by Revenue Canada Taxation, under the authority of s. 42 of the *Income Tax Act*, R.S.B.C. 1979, c. 190 (and pursuant to agreement with the Province); by the Ministry of Energy, Mines and Petroleum Resources, under s. 8 of the *Mineral Land Tax Act*, R.S.B.C. 1979, c. 260; and by British Columbia Hydro and Power Authority, under s. 246 of the *Railway Act*, R.S.B.C. 1979, c. 354. There is nothing in any of these three statutes which would suggest how the sheriff is to go about making the seizures. There is, for instance, no provision directing or permitting him to take assistance with him (as there is where the sheriff acts under court order on the authority of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, ss. 69 and 71 (5); the *Health Act*, R.S.B.C. 1979, c. 161, s. 19 and the *Vancouver Charter*, R.S.B.C. 1953, c. 55, s. 539. It is likely that the sheriff, as "peace officer" under the *Criminal Code*, R.S.C. 1970, c. C-34, is "administering the law" and is therefore entitled by s. 25 of the *Code* to use reasonable force in carrying out the seizures he is authorized to make.

[360] The director of Public Health Inspection for the Ministry of Health welcomed the use of the sheriff if he was trained "to assess the potential health hazard of the article being seized." Several other replies came in to the same effect. The registrar of the College of Pharmacists, which uses its own inspectors, and calls in the police when assistance is required, thought that the attendance of the sheriff on a "revisit" would be helpful "to insure the cooperation of the party being investigated and to protect [the inspectors] from physical threats."

CHAPTER VI THE COURT OFFICER: GENERAL

A. Officer of All of the Courts in the Province

1. The Disciplinary Power

In 1762, Serjeant Hawkins wrote about "Ministers of the Court" — of whom he took the sheriff to be one — and about:[1]

> . . . the general Reason of the Law, which gives all Courts of Record a Kind of discretionary Power over all Abuses by their own Officers, in the Administration or Execution of Justice, which brings a Disgrace on the Courts themselves, as not taking sufficient Care to prevent them . . . .

That "general Reason" has appealed to legislators in British Columbia since 1881, when, by the *Local Administration of Justice Act, 1881*,[2] sheriffs were first unequivocally declared to be officers of the Supreme Court of the Province.[3] But there is no doubt that by the common law they were officers anyway[4] and this fact was recognized when the earliest steps were taken to provide for the administration of justice in the wilderness. Thus, the *Order in Council* of 1856 for Vancouver's Island[5] declared that the Supreme Court of Civil Justice was empowered "by any rules or orders of Court" to regulate "the proceedings of the sheriff and other ministerial officers of the said Court." Today, section 5 of the *Sheriff Act*[6] provides that a "sheriff is an officer of all of the courts in the Province."

What does it mean to say that someone is an "officer of the court?"[7] Perhaps surprisingly, the question is not an easy one to answer — "there being scarce any Thing of this Kind to meet with in the Books."[8] For some reason, only Hawkins,[9] and to a lesser extent Master Jacob,[10] have thought to put the law concerning officers of the court in one place, so that the process of gathering it up is a frustrating one and there is more than the usual potential for error. Hawkins and Jacob are helpful, but Messrs. Oswald,[11] Fox,[12] Borrie and Lowe,[13] and Cordery[14] also provide assistance because the power to discipline officers is linked to contempt, and because solicitors are the group of officers who have most frequently been subject to the power.

To say that someone is an "officer of the court" is, at bottom, to say that the court may sometimes deal with him in ways in which it may not deal with

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[1] W. Hawkins, 2 *A Treatise of the Pleas of the Crown* (1762) at 142.

[2] S.B.C. 1881, c. 1, s. 20.

[3] It is clear from s. 22 of the *Sheriffs Act*, S.B.C. 1873, No. 7, that the sheriff was regarded as an officer of the court, but it was not until 1881 that he was first described that way by statute.

[4] *See, e.g.*, the annotation to *Mitton's Case*, (1584) 4 Co. Rep. 32b, 76 E.R. 965, at 969; *Laicock's Case*, (1627) Latch. 187, 82 E.R. 338 ("le vic est un officer a č Court) and *Regina* v. *Wyatt*, (1705) 2 Ld. Raymd. 1189, 92 E.R. 286, *per* Holt C.J. at 290. *See also* Sir J.C. Fox, *The History of Contempt of Court* (1927) at 156 and Sir W. Holdsworth, 3 *A History of English Law* (5th ed., 1942) at 391 *et seq.*

[5] *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council* (4 April 1856).

[6] R.S.B.C. 1979, c. 386.

[7] In this phrase, Master Jacob would include "all persons who are in some official way connected with the court or its process or any pending proceedings:" *see* "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg. Prob. 23, at 46. G. Borrie and N. Lowe, *The Law of Contempt* (1973) at 232, say that the term includes "any person having official duties to perform in connection with court proceedings."

[8] These words are borrowed from Hawkins, *supra*, note 1 at 145.

[9] *Ibid.* at 140-54.

[10] *Supra*, note 7 at 46-8. There is a section on "officers of the court" in W. Tidd, 1 *The Practice of the Courts of King's Bench and Common Pleas* (9th ed., 1828) at 43-59, but it simply describes who they were at the time.

[11] *Oswald's Contempt of Court* (3rd Canadian ed., 1911) at 70-3.

[12] *Supra*, note 4, esp. Chapter VIII, "Amercement and Fine" at 118-201.

[13] *Supra*, note 7 at 34 and at 232-41.

[14] *Cordery's Law Relating to Solicitors* (6th ed., 1968) at 158-77.

"strangers."[15] The courts' usual remedy for "vindicating their own authority"[16] is to fine[17] or imprison for contempt those persons who are shown to be "interfering with the course of justice."[18] These persons could of course include both officers and strangers. There is no doubt that the courts have the "inherent jurisdiction"[19] to punish their own officers[20] and that they will do it without describing as contemptuous the conduct which attracts the penalty. In other words, the power to cite for contempt and the power to control officers are not quite the same thing[21] — although Hawkins[22] did not admit the distinction and neither Oswald[23] nor Borrie and Lowe[24] trouble to make it. As Master Jacob has written:[25]

> The basis for the exercise of [the power to control the conduct of court officers] is of course contempt of court, for any misconduct by such a person and any undue interference with him in the performance of his duties is treated as a contempt of court itself; but the court may exercise its summary powers without dealing with an offender for contempt of court as such.

Mere discourtesy may be enough to prompt a court to act,[26] but the behaviour complained of usually goes beyond that.

Authority of the highest kind for the exercise of a disciplinary jurisdiction falling short of citation for contempt may be found in *Myers* v. *Elman*,[27] a case in which the House of Lords upheld the punishment of a solicitor. There were, as well, some earlier decisions about solicitors, notably *Sittingbourne*

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[15] This word is from Fox, *supra*, note 4 at 156. On the point of "strangers," *see* the note to *In re Sheriff of Surrey*, (1860) 2 F & F 241, 92 E.R. 1041, where it is said: "But the sheriff, as the officer of the Court, was clearly liable to summary punishment, even if a stranger would not have been. And the sheriff's mistake was in fancying that he had an immunity, or any inherent authority, whereas he was, on the contrary, as a ministerial officer of justice, under a peculiar duty and responsibility." In *Holroyd* v. *Breare*, (1819) 2 B.& Ald. 473, 106 E.R. 439, Abbott C.J., for the Court, at E.R. 440, seems to suggest that the sheriff, as an officer of the court, is not a mere minister but is "part of the court itself."

[16] *See The King* v. *Almon*, (1765) Wilm. 243, 97 E.R. 94, *per* Wilmot J. at 99. This was an opinion that was prepared, but never delivered in judgment: *see* the note to the report at 94-5 and *see* Fox, *supra* note 4 at 5.

[17] Fox, *supra*, note 4 at 160, says that in earlier times "a pecuniary penalty assessed upon an officer was properly called an amercement." *See, e.g.*, *Griesley's Case*, (1588) 8 Co. Rep. 38a, 77 E.R. 530 at E.R. 534: ". . . it is resolved by the justices that that which is assessed on an officer or minister of the Court is called an amercement, and not a fine; but on a stranger to the Court for a misdemeanor it is called a fine, and not an amercement." Fox, *ibid.* at 119-20, describes the emergence of amercement:

> Amercement originated in the notion that, upon conviction of an offence, the offender's liberty or property was forfeited: in other words, was in The King's mercy (*in misericordia regis*). Later, amercement applied only in the case of minor offences where property alone was declared in mercy, and then, in lieu of forfeiture, a sum of money was exacted, the amount being afeered by the neighbours according to the means of the offender. The procedure in the Superior Courts was as follows. The Justices declared the offender to be in mercy and fixed provisionally the amount to be paid, having regard to the nature of the offence. The offender gave security for the payment by gage and pledge and the amount was afterwards afeered, according to the means of the offender, by twelve jurors in the County Court under the direction of the Sheriff. . . .
>
> There is little doubt that amercement was introduced in England by William the Conquerer in the place of the Anglo-Saxon wite.

In North Carolina, sheriffs can apparently still be amerced for "delinquency:" *see* F.B. Wyatt, "Amercement of Sheriffs" (1974) 10 Wake Forest L. Rev. 237.

[18] This is the popular phrase: *see, e.g.*, *Weston* v. *Central Criminal Court Courts Administrator*, [1977] Q.B. 32 (C.A.) *per* Lord Denning M.R. at 43.

[19] That is how it was described by Scott L.J. in *Brendon* v. *Spiro*, [1938] 1 K.B. 176 (C.A.) at 190. *See also* Jacob, *supra*, note 7 at 46.

[20] *Beal's Case*, (1699) 12 Mod. 251, 88 E.R. 1301, which is mentioned by Master Jacob, *supra*, note 7 at 46, n. 86, gives some indication of the propriety of the possessive "own." It is reported that "Beal, *an attorney* of the Court, sued in the Sheriff's Court for his fees; and upon motion he was forced to refer it to the Master, for that his person is under the power of the Court."

[21] In *Weston* v. *Central Criminal Court Courts Administrator*, *supra*, note 18 at 42, Lord Denning M.R. asked: "What jurisdiction was the judge exercising? Was he acting under the disciplinary power of the court over solicitors? Or under the jurisdiction to punish the contempt of court?"

[22] *Supra*, note 1.

[23] *Supra*, note 11.

[24] *Supra*, note 7.

[25] *Supra*, note 7 at 47.

[26] A sheriff who writes a "scurrilous" letter may not find himself cited for contempt, but he still might be punished for breaching his duty to the court: *see Weston* v. *Central Criminal Court Courts Administrator*, *supra*, note 18 at 43, *per* Lord Denning M.R. Bridge L.J. at 47, agreed that there would be no contempt, but said nothing about a punishment for breach of duty.

[27] [1940] A.C. 282.

and Sheerness Railway Company v. *Lawson*[28] and *Brendon* v. *Spiro*.[29] And in *Re Grey*, Lord Esher M.R. gave the justification for the power:[30]

> . . . the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers.

No case has been found in which a sheriff has been punished by a court exercising the inherent disciplinary jurisdiction. All the reported cases are ones of contempt. But that does not mean that the power does not exist as far as sheriffs are concerned. Master Jacob[31] certainly sees the cases about solicitors only as examples of a power which is available against all officers. He seems to be right because the power was exercised in the solicitor cases not because the offenders were solicitors, but because they were officers of the court.[32] In a case called *Brown* v. *Gerard*,[33] the impression is left that had it been a sheriff who offended, summary punishment would have followed.

In any event, there is no less reason to supervise sheriffs to ensure their honourable conduct than there is to watch over solicitors. Each group of officers is an equally important part of the process by which justice is administered and there is at least as much need to supervise sheriffs as there is to control solicitors.

What does it mean to be an "officer of the court"in the context of sheriffs? First, it seems to mean that the court can enforce a sheriff's undertaking even if the undertaking has not been given to the court itself. It is common knowledge among lawyers that a court may fine or commit for contempt someone who has breached an undertaking given to the court.[34] It is only in the exercise of its disciplinary jurisdiction that undertakings given to others by solicitors can be enforced — a principle which should extend to sheriffs. There is ample authority for the exercise by a court of a power to require one of its solicitors to carry out an undertaking given to others. *United Mining and Finance Corporation, Limited* v. *Becher*[35] settled the question. It seems only necessary that the solicitor be shown to have been acting "professionally," that is, in the character of solicitor.[36] The same test should apply to the sheriff.

While sheriffs may infrequently give undertakings, and there may be little pressure except from the Bench itself for them to do so, one cannot ignore the possibility that undertakings will be requested and that they will be given. For instance, a hauler in a remote area who has services no one else can provide may refuse to work for the sheriff on an execution unless the sheriff will undertake that the job will be finished by a certain hour. If the reasonable anticipated costs of the service are paid to the sheriff by the creditor,[37] the sheriff could be in a position where he must give the undertaking in order to ensure that his duty to the creditor is discharged. And such an undertaking might be enforced[38] even in the absence of "moral misconduct" on the sheriff's part.[39] If nothing else, this example may serve to remind deputy sheriffs of the dangers the word "undertaking" may pose for them.

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[28] (1885-6) 2 T.L.R. 605 (C.A.).

[29] *Supra*, note 19.

[30] [1892] 2 Q.B. 440 at 443.

[31] *Supra*, note 7 at 47.

[32] *See, e.g.*, *Brendon* v. *Spiro*, *supra*, note 19 at 185, where Scott L.J. talked about ". . . the jurisdiction of the judge who hears a case to exercise control over the conduct of solicitors, as officers of the Court . . . ."

[33] (1834) 1 C.M. & R. 595, 149 E.R. 1218.

[34] *See* Borrie and Lowe, *supra*, note 7 at 325. For the proposition, they cite *Hallam* v. *Hallam*, (1961) *Times*, September 29; *Milburn* v. *Newton Colliery, Ltd.*, (1908) 52 Sol. Jo. 317; *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.*, (1875) 10 Ch. App. 450 (C.A.); and *Biba, Ltd.* v. *Stratford Investments, Ltd.*, (1972) *Times*, September 1.

[35] [1910] 2 K.B. 296. There the undertakings were "not given directly either to the Court or to a party in a suit" (*per* Hamilton J. at 302).

[36] *Ibid.* at 303.

[37] As s. 8 of the *Sheriff Act*, R.S.B.C. 1979, c. 386 requires before the sheriff is obligated to act.

Another circumstance in which the special disciplinary power may be exercised where a citation for contempt would be undesirable is illustrated by *Myers* v. *Elman*.[40] A solicitor had left the daily conduct of his practice to his managing clerk. In a fraud action, the clerk filed an affidavit of documents which he knew to be false. The House of Lords held the solicitor liable for the clerk's misconduct and confirmed the order of a lower court which had fixed the solicitor with "one-third of the taxed costs of the action and also two-thirds of the costs of the application" which had been brought against him. There need be no "personal obliquity," said Lord Wright.[41] He was joined, among others, by Lord Porter, whose reasons contain this sentence:[42] "It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction."

This principle raises interesting questions in British Columbia where the opportunities for passing responsibility onto someone else in sheriff services are so great. The point to be made is that the Attorney General and his Deputy (who are both lawyers and are therefore both officers of the court), with whom the ultimate responsibility for sheriff services rests,[43] may be liable (even if it may be unlikely) to be punished by the courts for the misconduct of anyone below them in the bureaucratic ladder, whether those below them are officers of the court or not. The same could be said for the director, who is a sheriff, for his assistant (but only if he or she is a lawyer), for the regional and district managers (if they are "deputies" of the director at common law) and for all the deputy sheriffs including the fee-for-service process servers.

If this analogy is correct, much care must be taken in the way in which the work entrusted to sheriff services is carried on.

The procedure which should be followed by a court intending to exercise the punitive jurisdiction is the same process as is used for cases of contempt. As Hawkins put it for contempt, the courts " . . . may proceed in a summary Manner according to their Discretion."[44] There is ample authority to support the summary method where contempt is alleged. For example, in *Rex* v. *Beardmore*,[45] an under-sheriff had failed properly to carry out the sentence of a court which had ordered that John Shebbeare be "set in and upon the pillory." Evidence admitted on a hearing which followed a rule that the under-sheriff show cause why an attachment[46] should not issue against him disclosed:[47]

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[38] Whether an undertaking will be enforced is always a matter for the discretion of the court: *see Silver and Drake (a firm)* v. *Baines*, [1971] 1 All E.R. 473 at 477-8 *per* Megaw L.J.

[39] *Per* Hamilton J. *in United Mining and Finance Corporation, Limited*, v. *Becher*, *supra*, note 35 at 305.

[40] *Supra*, note 27.

[41] *Ibid*. at 319.

[42] *Ibid*. at 335.

[43] *See* the comments in Chapter III.

[44] *Supra*, note 1 at 141.

[45] (1759) 2 Burr. 792, 97 E.R. 564.

[46] "The writ of attachment was introduced in England not later than the reign of Henry II. The direction to attach a man implied that he was to be attached by some tie to the control or jurisdiction of the Court, so that it should have a hold on him, in other words, that he should give security for his appearance. The writ directed the Sheriff either to attach the party by gage or pledge or by his body. In the latter case the body of the person attached was the security for his appearance and was effectual for the purpose, provided he did not escape. The writ was applicable to the case of a party who had been guilty of default or other contempt:" *see* Fox, *supra*, note 4 at 57. In British Columbia until 1977, writs of attachment issued under Order XLIV (M.R. 621) of the Supreme Court Rules, 1961, were used to bring in alleged contemnors. Now, under Rule 56 of the Rules of Court, warrants to arrest offenders are issued to "a sheriff or other officer of the Court or to a peace officer."

[47] *Supra*, note 45 at 564.

> . . . "that the defendant only stood upon the platform of the pillory, unconfined and at his ease, attended by a servant in livery, (which servant and livery were hired for this occasion only,) holding an umbrella over his head, all the time: but his head, hands, neck, and arms were not at all confined or put into the holes of the pillory; only that he sometimes put his hands upon the holes of the pillory, in order to rest himself." And it was proved "that Mr. Beardmore attended as under-sheriff; with his wand; and that he treated the criminal with great complaisance in taking him to and from the pillory."

Lord Mansfield said[48] that it was " . . . admitted that such a disobedience to the rule of the Court, by their own officer, is punishable in this summary way." Reference to a "summary jurisdiction" was also made in *Simes* v. *Gibbs*[49] and in the *Sittingbourne Railway*[50] case. In *Brendon* v. *Spiro*,[51] which was an appeal[52] of an award of costs against a solicitor, it was argued that the court should not have acted summarily and that an application should have been made "before a Divisional Court upon affidavits asking for an order." Scott L.J. was not moved. He said that there was "no rule of procedure which affects the judge's jurisdiction."[53] The House of Lords has said the same thing. In *Myers* v. *Elman*, Lord Wright explained:[54]

> . . . the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the [officer] has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it.

Sir John Fox has put forward a plausible theory to explain the propriety of a summary procedure for cases of contempt. That theory seems applicable to cases of conduct which are not contemptuous but which nevertheless call for disciplinary action:[55]

> It has been said with regard to contempts committed by officers that they are presumed to be always present in Court, and on this ground any misconduct by them is punishable summarily as for contempt *in facie*.

He cites as his "authorities" Style's *Practical Register*[56] and Hudson's *Star Chamber*,[57] to which we do not have access, and *Heath* v. *Paget*,[58] in which it was said that a writ was brought "against an officer of the Court, who ought to be always present (in Court)."[59] This decision may or may not say what Fox attributes to it, but his theory is nonetheless attractive. The theory provides, at least as far as officers of the court are concerned, some logical justification[60] for the summary practice for contempt offered by Wilmot J. in the celebrated but undelivered opinion in *R*. v. *Almon*.[61]

Officers of court are subject to penalties which could not befall contemptuous strangers, at least strangers who were not parties to an action. The courts have the power to award costs against those of their officers who have misconducted themselves. It is an undoubted jurisdiction so far as solicitors are concerned; one need only look to *Myers* v. *Elman*[62] for that. By analogy, sheriffs could be liable as well. In any event, there is no doubt that sheriffs may be ordered to pay costs in cases where their behaviour is considered to be contemptuous. In *Lane* v. *Sterne*,[63] a motion was brought to commit the sheriff of Surrey, his under-sheriff and their officer for a contempt which occurred when the officer, acting under a regular writ of *fieri facias*, seized goods of a debtor then in the possession of a receiver whose appointment had been made by court order. Stuart V.C. is reported to have delivered a judgment in which he said that:[64]

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[48] *Ibid.* at 565.

[49] (1838) 6 Dowl. 310 (Q.B.).

[50] *Supra*, note 28 at 606.

[51] *Supra*, note 19.

[52] In England, the *Courts Act, 1971*, s. 10, has taken away the right of appeal from a disciplinary order summarily made.

[53] *Supra*, note 19 at 191-2.

[54] *Supra*, note 27 at 318.

[55] *Supra*, note 4 at 157.

[56] (4th ed.) at 59, under "Amercement."

[57] (Collect. Jurid.) ii, 148.

[58] (1672) 1 Lev. 1, 83 E.R. 266.

[59] At E.R. 267.

[60] Borrie and Lowe, *supra*, note 7 at 256, call it "a fine piece of scholarly research." They of course refer to the collection of articles which became Fox's *The History of Contempt of Court*, *supra*, note 4.

[61] *Supra*, note 16.

> . . . although it was not usual in cases of this kind for the Court, in vindicating what was due to its honour, to punish to the extreme point of committal, the uniform practice [is] to order those who had intruded upon the receiver to make good the costs and expenses occasioned to that property which was in the possession of the Court and occasioned by conduct which was improper, and in disregard of the order of the Court.

In the result, the sheriff and the creditor who had directed him to act[65] were mulcted with the costs. The under-sheriff and the officer seem to have escaped any penalty.

Costs were also awarded against a sheriff in *Re Heiron's Estate*[66] where the usual order was pronounced against a sheriff who had neglected to make a return to a *fi.fa*. The order was ignored and another motion followed which resulted in a further order that the sheriff make the return or in default stand committed to prison, and that in any case he pay the costs of the two applications which his conduct had necessitated.

A final question concerning the supervisory jurisdiction is whether it was desirable for the Legislative Assembly to have enacted section 5 of the *Sheriff Act*[67] in the form in which it was enacted. That section provides that a sheriff is an officer of the courts. It seems to follow that someone who is not a sheriff and who is not otherwise an officer is not an officer of the court and that therefore a sheriff who resigns as sheriff is no longer an officer. That was not the case at common law. The common law rule was stated in *Simes* v. *Gibb*.[68] There, Patteson J. said:[69]

> If a man be once an attorney, he cannot get rid of the summary jurisdiction of this Court with respect to what he has done while an attorney, by ceasing to be an officer of the Court. The rule is, once an attorney, always an attorney, for that purpose.

This rule was endorsed by the Court of Appeal for England in 1937 in *Brendon v. Spiro*,[70] the case of a man who had ceased to be solicitor on the record in a particular action. In answer to the argument that the court had no summary jurisdiction to discipline, Scott L.J. said:[71]

> To my mind it would be lamentable if the disciplinary power of the Court over solicitors, who have been on the record and have acted as officials of the Court, were limited in any such way.

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[62] *Supra*, note 27. Whether costs will be awarded is of course discretionary. *See, e.g.*, the *Sittingbourne Railway* case, *supra*, note 28, where the Court of Appeal declined to exercise the discretion.

[63] [1862] 10 W.R. 555 (Ch.).

[64] *Ibid.* at 555.

[65] In Chapter VIII, there is a discussion of those cases in which mandatory directions have been given to the sheriff.

[66] (1879) 12 Ch. D. 795.

[67] R.S.B.C. 1979, c. 386.

[68] *Supra*, note 49.

[69] *Ibid.* at 310-11.

[70] *Supra*, note 19.

[71] *Ibid.* at 185.

Does section 5 create a "lamentable" limitation; has the Legislature changed the common law in its zeal to be exhaustive? It may have done. *Hansard*[72] suggests that the provision was included in the *Sheriffs Act*[73] to ensure that it was understood by everyone that the sheriff was an officer, not only of the Supreme Court of British Columbia, but also of the Court of Appeal, of the County Courts and of the Provincial Court. In interpreting section 5, however, the courts are limited in the extrinsic aids they may examine. If the provision is interpreted using only the words the Legislature has provided, the conclusion may be unavoidable that a limitation was intended. That would be regrettable, because there is no sense in having a summary disciplinary power which can be avoided by resignation. Section 5 should be changed so the rule "once an officer, always an officer" is made clear.

Because sheriffs can be disciplined in this summary way, it might be useful to add a provision to the *Sheriff Act*[74] giving all sheriffs as, "officers of the court," the right to apply to court for directions about the way in which their duties to the court should be discharged. Applications may now be possible. The court might be asked to exercise its inherent jurisdiction "to control and regulate its process and proceedings."[75] But the judges and the Legislature in this Province seem disinclined to leave things to inherent jurisdiction.[76] Apart from interpleader,[77] there is express provision for only one kind of application to the court by a sheriff. That is an application under Rule 42 (26) of the Rules of Court for directions concerning the sale of property taken in execution.

A general right of application would reiterate the power of a court to superintend the way in which its work is carried out.[78] Moreover, applications would not only assist officers in particular cases, but would produce directions, similar to practice notes, which would be available to the deputies, the legal profession and the public. In this way, over time, the sheriff's work would become more comprehensible to everyone and the courts might regain some of the control they appear to have given up.

A danger to a general right of application is that deputy sheriffs might resort to the procedure too frequently and that the courts' time would be wasted. At first, there might be many applications (some of them unnecessary), but as expertise among the deputies developed, the number would probably decline. In any event, there should be few unjustified applications if the suggestion to appoint lawyers to supervise the deputies is accepted.

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[72] *See* (1976) 4 *Debates of the Legislative Assembly for British Columbia*, at 3134 where the Honourable Mr Gardom, the Attorney General, said on introducing the new sheriff's bill: "He's now an officer of all of the courts in the province, a position that I might say was true in practice in recent years but not in the legislation."

[73] S.B.C. 1976, c. 50.

[74] R.S.B.C. 1979, c. 386.

[75] *See Jacob*, *supra*, note 7 at 32.

[76] When the new Rules of Court for British Columbia were introduced in 1977, they contained no rule under which an application could be made for an order dismissing an action for want of prosecution. There had been provision under Order XXVII (M.R. 290) of the Supreme Court Rules, 1961. It was decided in *Edwards* v. *Kozoris*, [1972] 3 W.W.R. 556 (B.C.S.C.) that the courts had the power to dismiss as an incident of their inherent jurisdiction, but it was still thought to be necessary to make specific provision in the Rules of Court. There is a new Rule 2 (6) which grants the power expressly. Another example of the disinclination to leave things to inherent jurisdiction is found in Rule 44 (3) of the Rules of Court. That subrule requires anyone making an interlocutory application to specify the "rule or other enactment" on which he relies for the order. There is no mention of inherent jurisdiction.

[77] Interpleader proceedings are discussed in Chapter VII.

[78] There is historical justification for applications and for superintendence. *See*, *e.g.*, *King* v. *Kerons*, (1799) Rowe 397. There, a man who had been found guilty of having forged notes in his possession was sentenced to be "whipt," but the sentence was not carried out. The circumstances, and a statement of what the sheriff should have done, are found at 397:

> Mr. Sheriff Cash informed the Court, and produced the certificate of the physician of the prison, that the prisoner was so ill of a fever, on the day appointed for its execution, that it would have caused his death. The Court paid no attention to this statement, and fined the Sheriff L500. However, upon affidavit of the facts as stated, and that it was not in contempt of the Court, they reduced the fine to L25. The Sheriff ought to have obtained a delay from the Lord Lieutenant or from the Judges.

2. IS THE SHERIFF AN OFFICER OF THE LEGISLATIVE ASSEMBLY?

If the sheriff is officer "of all of the courts in the Province," then he is arguably an officer of the Legislative Assembly, because that body is likely a court of judicature. *Burdett* v. *Abbott*[79] and *Stockdale* v. *Hansard*[80] indicate that that is the case for the House of Commons in England, and there is nothing in British Columbia which would suggest that a different rule should apply here. "Court" is not defined in the *Interpretation Act*[81] and there is no limiting definition of the word in the *Sheriff Act*.[82] Moreover, section 1 of the *Legislative Assembly Privilege Act*[83] provides that:

> The Legislative Assembly and its committees and members have the privileges, immunities and powers that were exercised by the Commons House of Parliament of the United Kingdom and its committees and members on February 14, 1871, so far as not inconsistent with the *Constitution Act* and whether held or exercised by custom, statute or otherwise.

The judicial decisions which stated and affirmed the constitutional principle of the House of Commons as a court were delivered before 1871 and there is nothing inconsistent with that principle in the *Constitution Act*.[84] It therefore seems to follow that the sheriff is an officer of the Assembly.

It should be noted that there is no historical precedent in England for the sheriff to be a formal officer of the House of Commons. It would be surprising if it were the case that sheriffs, who were disqualified from membership in the Commons because they were too close to the King,[85] should be officers of the assembly. However, while they were not strictly speaking officers of the House of Commons, sheriffs were called upon from time to time to help to execute orders of the House. Erskine May's *Treatise*[86] provides several examples, including a case in 1660 when the Serjeant at Arms "was expressly empowered 'to break open a house in case of resistance, and to call to his assistance the sheriff of Middlesex'."[87] The power in this Province to call on the sheriff (and others) is now found in section 4 (2) of the *Legislative Assembly Privilege Act*.[88] That section provides that a sheriff can be required by a warrant issued under the authority of the Legislative Assembly,[89] to give his assistance to the Assembly. He is liable to punishment under the *Offence Act*[90] for refusing to help. Thus, this way also the sheriff is an "officer."

Obviously the occasions for issuance of a warrant will be rare: the most recent incident cited by May happened in 1810.[91] But the grounds of our Parliament Buildings are a popular place for demonstrations when the Assembly is sitting and it is not inconceivable that the sheriff might join "constables and others" as the persons to whom a warrant is issued. If he is called to help, section 4 (1) of the Act exempts him from liability "in damages or otherwise for an act done under the authority of the Legislative Assembly, or under or by virtue of a warrant issued under that authority." Thus, as May[92] indicates, he would succeed in defending an action in trespass if he broke open the doors of a house when necessary in order to effect an arrest.

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[79] (1811) 14 East 1, 104 E.R. 501, *per* Bayley J.

[80] (1839) 9 Ad. & E. 1, 112 E.R. 1112, *per* Lord Denman, C.J.

[81] R.S.B.C. 1979, c. 206.

[82] R.S.B.C. 1979, c. 386.

[83] R.S.B.C. 1979, c. 229.

[84] R.S.B.C. 1979, c. 62.

[85] *See* the discussion of the exclusion in Chapter IV.

[86] *On the Law, Privileges, Proceedings and Usage of Parliament* (19th ed., 1976).

[87] *Ibid.* at 125.

[88] R.S.B.C. 1979, c. 229.

[89] It is the Speaker's warrant: *see* May, *supra*, note 86 at 124.

[90] R.S.B.C. 1979, c. 305, s. 5.

[91] May, *supra*, note 86 at 125.

[92] *Ibid.*

3. WHO ARE OFFICERS OF ALL OF THE COURTS?

Section 5 of the *Sheriff Act*[93] provides that a "sheriff" is an officer of all of the courts in the Province. As discussed earlier[94] "sheriff" includes "deputy."[95] Thus, the director of sheriff services, all the persons hired by the Public Service Commission as "deputies" and all "fee-for-service" process servers appointed by the director "as deputies" are officers of the courts. The regional and district managers are only officers if they are "deputies" at common law. The clerks and stenographers are not officers. The only questionable group is the employees of sheriff services who are the "sheriff's officers." These are the people in the superior courts who help the deputies to manage juries. Their duties are discharged in the courtroom and in and outside the jury room. In practice, in connection with juries, they do anything that a judge may tell them to do: for example, to bring the jury in, to take the jury out and generally, to help provide for jurors' comforts.[96] Yet these "sheriff's officers" are probably not officers of the court and the occasions on which they may be disciplined will be limited to cases of contempt. If this view is correct, it follows that those who interfere with the discharge of these "officers'" responsibilities will escape punishment, even though the actions would be contemptuous if the "officers" were officers of the court.

"Sheriff's officers" are probably not officers of the court because, on the one hand, they are not deputies either at common law or by statute, and, on the other, because at common law sheriff's officers were not officers of the court. *Brown* v. *Gerard*[97] is authority for that rule. There, an action was brought against the sheriff of Lancashire because Oglethorpe, one of his officers, had allegedly taken excessive fees on an execution. On the day the cause stood for trial, Oglethorpe, who conducted the defence, undertook in settlement to withdraw the plea and to pay the plaintiff £12 for the debt, and the costs of the action. On the strength of the undertaking, the cause was not entered for trial and the action was stayed. Oglethorpe then neither paid the money nor withdrew the plea. A motion was made for a rule *nisi* to compel him to perform the undertaking. The rule was refused. Gurney B. said:[98]

> The Court will compel an attorney to perform such an undertaking, because he is the officer of the Court. The person against whom the present application is made is not an officer of the Court, and not being a party in the cause, the Court cannot compel him in this summary way to perform his undertaking.

It seems to be undesirable that a group of employees in sheriff services working as closely with the judges as the "sheriff's officers" do should not be "officers of the court." It is probably just an oversight. An amendment to the *Sheriff Act* should be made to remedy this deficiency.

There is another practical reason for clarification, stemming from the *County Court Act*.[99] Section 39 provides in part that the:

> . . . sheriff shall, in all proceedings in which the County Court has jurisdiction, discharge any duties which an officer of the Supreme Court can discharge,[100] either under the order of that court or the practice of it, and all officers of the court shall, in discharging the duties, conform to any rules or orders made under this Act.

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[93] R.S.B.C. 1979, c. 386.

[94] *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 23 (2) and Chapter III.

[95] According to Fox, *supra*, note 4 at 162, under-sheriffs were "officers of the court" at least as early as 24 Edward III [That was the year 1351: *see* G.S.P. Freeman-Grenville, *The Queen's Lineage* (1977) at 14]. And they were still officers in 1759: *see Rex* v. *Beardmore*, *supra*, note 45 at 565 *per* Wilmot J. But in the *Final Report of the [Evershed] Committee on Supreme Court Practice and Procedure* Cmd. 8878 (1953), it was said, in para. 400 at 134, that because under-sheriffs were not officers of the court, no records were available from them.

[96] The duties are described more fully in Chapter VIII.

[97] *Supra*, note 33. *See also* 1 Chitty's *Archbolds* (1862) at 16 and 19.

[98] *Ibid*. at E.R. 1218.

[99] R.S.B.C. 1979, c. 72.

Unless the officers of the court are clearly identified, it will not be clear who is bound to discharge the statutory duty.

The same difficulty is presented in a different way in another part of the *County Court Act*. Section 53 provides that when an action is brought in the County Court by an "officer of the court" in his own right, the defendant may apply for an "order that the cause be sent for the hearing to some other convenient court" of which the judge to whom the application is made is not the judge.[101] This provision is a casualty of time which harkens back to the days when one judge for each county was the rule. No equivalent procedure is given in either the *Supreme Court Act*[102] or the *Small Claim Act*.[103] This state of things is not surprising given the power of any judge to disqualify himself when he may not, for whatever reason, be able to do justice. One would expect any judge to withdraw where he thought that his relationship with an officer of the court could prejudice the outcome. Section 53 makes transfer mandatory on the defendant's application. The provision is not without merit in that it makes appeals against a reluctant judge unnecessary, with the desirable result that the costs of administering justice are kept down. The difficulty is that, as the sheriff is an officer of all the courts in the Province, there is no County Court in which this objection could not be raised. This anomaly should be resolved.

Section 54 of the *County Court Act*, it should be noted, provides that if an action is brought against an officer of the court, it may be brought "in the court of which he is an officer or in an adjoining County Court." This provision, like section 53, is in need of amendment.

4. AS "OFFICER" OF THE SUPREME COURT OF CANADA

Section 99 of the Federal *Supreme Court Act*[104] provides in part:

> (1) The process of the Court runs throughout Canada . . . and shall be directed to the sheriff of any county or other judicial division into which any province is divided.
>
> (2) The sheriffs of the said respective counties or divisions are *ex officio* officers of the Supreme Court, and shall perform the duties and functions of sheriffs in connection with the Court.

In the federal as in provincial parlance, "sheriff" includes "deputy,"[105] so that process of the Supreme Court of Canada may be sent to the director of sheriff services in British Columbia or to any of his deputies. It is probably best to ignore the references in section 99 to county or judicial divisions. British Columbia has counties but they no longer have special meaning for sheriff services. Process coming to the director would likely come to him as sheriff of the Province, the Province being a "judicial division" in the sense that the provincial Supreme Court has jurisdiction to hear all cases arising in British Columbia.[106] The deputies would then receive process as his deputies for the same division.

It is not clear what the "duties and functions of sheriffs in connection with the Court" is supposed to mean. There seems to be only two things the

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[100] This provision was undoubtedly enacted in order to dispense with the decision in *Tunno* v. *Morris*, (1835) 2 C.M. & R. 298, 150 E.R. 129 (Exch. of Pleas). There, Lord Abinger C.B. said at 131: "I think we may consider the authorities cited as having sufficiently established the distinction between the sheriff, as an officer of the superior courts, and as an officer of the county court, which is in fact the court of the sheriff. Bolland B. said, also at 131: "The sheriff is in truth the real effective judge of the county court; at all events, an essential part of it: he is therefore in a very different situation from that in which he stands as an officer of the courts at Westminster."

[101] At common law, officers of the court enjoyed the privilege "of suing and being sued in the courts to which they were officially attached.": *see* W. S. Holdsworth, 9 *A History of English Law* (3rd ed. 1944) at 250.

[102] R.S.B.C. 1979, c. 397.

[103] R.S.B.C. 1979, c. 387.

[104] R.S.C. 1970, c. S-19.

[105] *Interpretation Act*, R.S.C. 1970, c. I-23, s. 23 (2), *as am*. R.S.C. 1970 (2nd Supp.), c. 29, s. 1 (2).

[106] *Supreme Court Act*, R S.B.C. 1979, c. 387, s. 8.

sheriff needs to do under the *Supreme Court Act.*[107] First, under section 71,[108] he must (presumably) accept a fiat issued to him by a judge of the Court of Appeal for the Province in a case where security has been deposited for a further appeal. Second under section 72, where the sheriff has made or received money[109] on an execution at the time he receives a fiat, but has not paid the money over to the party who issued the execution, he must pay it to the party appealing. If he does not pay it, he is liable to be sued for it.

Unless Provincial sheriffs owe common law responsibilities to the Supreme Court of Canada, and this seems unlikely in light of the court's statutory origin, there are no other "duties or functions of sheriffs in connection with the Court."

B. The Duty to Attend the Judges

1. The Source of the Responsibility

There is evidence, despite the lack of references in the *Order in Council* of 1856[110] and the *Sheriffs Act, 1860,*[111] that the judges charged with the duty of administering justice in British Columbia before Confederation were attended by the sheriff. While a contemporary journal containing an account of the experience of an assize court clerk[112] and a recent biography of Chief Justice Begbie[113] both suggest that any attendance there might have been was given by others, there is a reference in at least one work to the "Sheriff of British Columbia" accompanying the Chief Justice on circuit[114] and in a letter found in the Provincial Archives at Victoria, A. C. Elliott, who was High Sheriff of the Province, complained that the fees he received from his work were inadequate and that he had had to attend a whole Assize for no return at all.[115] It was not until 1873 that statutory provision was made requiring the "sheriff [to] give his attendance upon [the] Judge or Judges . . . for the maintenance of good order in Her Majesty's Courts."[116] It is not surprising that the formal step was so long in coming. There were few sheriffs[117] and few trials. Moreover, the judges who came to British Columbia in those days expected some discomfort[118] — they were apt to look upon life as an adventure.[119] These local conditions explain why the job of looking after the judges, which the sheriffs in England had done for centuries, were not assumed by sheriffs here until the new Province was well under way.

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[107] R.S.C. 1970, c. S-19.

[108] Amended by R.S.C. 1970, (1st Supp.), c. 44, s. 7.

[109] Nothing is said about what the sheriff must do when he has seized goods which remain in his possession.

[110] The *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council,* (4 April 1856) gave the sheriff general responsibility for executing the court's process.

[111] By this Proclamation, the common law duties of the sheriff were supplemented to meet local problems in the mainland colony.

[112] *See* D.B. Smith, ed., "The Journal of Arthur Thomas Bushby, 1858-1859" (1957-1958) 21 B.C. Hist. Q. 83 at 144.

[113] D.R. Williams, *The Man for a New Country* (1977) at 44-5.

[114] *See* D.M.L. Farr, "The Organization of the Judicial System in the Colonies of Vancouver Island and British Columbia, 1849-1871" (1967) 3 U.B.C. L. Rev. 1 at 20. The article is an abridgment of a paper with the same title which Professor Farr wrote in 1944 when he was a student of history at The University of British Columbia. Copies of that paper, which is well worth reading, can be found in the Special Collections Room in the Main Library of the University, and in the Provincial Archives, at Victoria.

[115] The Archives' reference is F520.

[116] *Sheriffs Act,* S.B.C. 1873, No. 7, s. 16.

[117] According to Farr, *supra,* note 114 at 9, the first sheriff of Vancouver Island was George W. Heaton, who was appointed on 15 January 1859. *But see* F. W. Howay, 2 *British Columbia* (1914) at 657 where reference is made to an occurrence in August 1858 involving "the sheriff in Victoria." "The first High Sheriff of [the colony of] British Columbia, appointed March 1, 1859, was Charles S. Nicol:" *see* Farr at 20.

[118] *See, e.g.,* Begbie's letter, quoted in Williams, *supra,* note 113 at 30.

[119] *Ibid.* at 40.

In England, from the time the sheriffs began to lose their judicial duties,[120] they had a responsibility to the itinerant justices. The General Eyre provides an example. Holdsworth states that a writ of summons issued to the sheriff and that:[121]

> By this writ, which was issued some weeks before the beginning of the eyre, he was directed to summon the archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders of the county, four men and the reeve from each township, twelve men from each borough, and all others who were bound to attend the justices in eyre. He was to cause to come before the justices all pleas of the crown which had arisen since the last eyre, and all pleas and assizes; and likewise assizes and pleas set down for hearing before the judges of assize or gaol delivery, or before the court of Common Pleas. He was to summon all persons who had filled the office of sheriff since the last eyre and the heirs and executors of deceased sheriffs, together with all the writs that they had received; and all who claimed franchises that they might show by what warrant they claimed them. The sheriff himself with all his officers and bailiffs was also to give his attendance. He was to issue a proclamation that all who had complaints to make of any bailiff or officer, royal or otherwise, were to come and make their complaints.

In time, the character of the sheriff's attendance changed; his ministerial duties were reduced and his ceremonial and custodial responsibilities were enlarged. But whatever the nature of the work, it was clear that duties were owed to the judges. Thus in *Ex parte Fernandez*,[122] Willes J. said that " . . . the law gives to the justices of assize during their circuits the aid and control of the high sheriff of each county."[123] His Lordship also quoted from Dalton, who had said that:[124]

> '. . . the high sheriffs themselves of every shire are in person to attend upon the justices or judges of the assize and gaol-delivery in (and through) their circuits, and shall give their attendance for the due executing of the commandments and processes of the said judges in matters concerning the execution of their offices and ministration of justice.'

What is said here applies with equal if not greater force to the judges of the superior courts at Westminster.[125]

In fact, there were two aspects to the sheriffs' responsibility to the judges. The first was to meet them as they came on circuit and to provide for their necessities and comfort.[126] The second was to ensure their adequate protection[127] and to preserve order in court.[128] In the *Fernandez* case,[129] Willes J. quotes Lord Bacon on the importance of the first duty:

> 'The attendance of the sheriffs of the counties, accompanied with the principal gentlemen, in a comely, not a costly equipage, upon the judges of assize at their coming to their place of sitting, and at their going out, is not only a civility, but of use also: it raises a reverence to the person and places of the judges, who, coming from the King himself on so great an errand, should not be neglected.'

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[120] As early as 1194, when "Richard I forbade Sheriffs to act as royal justices in their own counties:" *see Mather on Sheriff and Execution Law* (3rd ed., 1935) at 20. During the House of Lords' inquiry into the office of sheriff in 1888, Lord Camperdown received an affirmative reply from Sir Baldwyn Leighton to this question: "It was [the sheriffs'] duty to receive the king, and that made it their duty ultimately to receive his judges?" *See* the Minutes of Evidence accompanying the *Report from the Select Committee of the House of Lords on High Sheriffs*, Cmd. 257 (1888) at 17.

[121] W. Holdsworth, 1 *A History of English Law* (7th ed., 1956) at 266. *See also* W. Morris, *The Medieval English Sheriff to 1300* (1927) at 208-9 and Mather, *supra*, note 120 at 5.

[122] (1861) 10 C.B. (N.S.) 3, 142 E.R. 349.

[123] *Ibid.* at E.R. 368.

[124] *Ibid.*

[125] *See, e.g.*, footnote (a) at E.R. 1041 of the report of *In re The Sheriff of Surrey*, (1860) 2 F. & F. 236, 175 E.R. 1039: ". . . for the Justices itinerant have, by virtue of their commissions, all the authorities and powers of the Superior Courts."

[126] In W.H. Watson, *A Practical Treatise on the Office of Sheriff* (2nd ed., 1848) it was said at 392: "The sheriff, as well as his under-sheriff, must be in constant attendance on the judges during the whole of the assizes, and should provide the judges with lodgings, according to the custom of the particular county."

[127] *See, e.g.*, J. Derriman, *Pageantry of the Law* (1955) at 115: "In days gone by he had also to guard them from harm in their journey from one border of his county to the other."

[128] *In re The Sheriff of Surrey*, *supra*, note 125.

[129] *Supra*, note 122 at 369. The remark is attributed to "Lord Bacon, in his advice to Sir George Villiers, upon the duties of a prime minister."

It is not clear whether the second duty was discharged as part of the sheriffs' general responsibility to ensure that the king's peace was kept or because a special obligation was owed to the judges. Because the duty to receive the judges seems to have derived from the obligation to attend the king, it is likely that there was no special responsibility to the judges because they were judges. It seems better to say that the responsibility arose because they were the *king's* judges. Whatever the source of the duty, it is clear that the sheriff hired "javelin men"[130] to assist him. Derriman explained:[131]

> For safety and due ceremony the high sheriff must have retainers — men-at-arms with javelins, a form of short spear, and trumpeters. Though a large armed escort for Her Majesty's judges was perhaps originally needed, the number of retainers was later kept up for display by individual wealthy sheriffs who no doubt vied with each other over the magnificence of their entourage . . . .

Despite an Act of Charles II,[132] designed as Derriman said "to keep the customary pageantry within bounds,"[133] there were still reports of much splendour. Thus, in 1787 a procession to the Assizes was described this way:[134]

> On Sunday last, Sir Richard Arkwright, Knight, sheriff of the County (of Derby), arrived at Derby, accompanied by a great number of Gentlemen, &c on horseback; his javelin men (thirty in number, exclusive of bailiffs, &c. &c.) dressed in the richest liveries ever seen there on such an occasion. Their coats were dark blue elegantly trimmed with gold lace; scarlet waistcoats laced with gold, and buff coloured velvet Breeches; they had also blue great Coats, buckled behind after the manner of his Majesty's Regiment of Horse Guards; their Hats were smartly cocked, with gold button, Cap and tassels; they all rode on Black Horses, and had new bridles given them by the sheriff, also new boots, &c. The Trumpeters were mounted on Gray Horses, and elegantly dressed in Scarlet and gold. The High Sheriff's coach was very elegant and fashionable, with plated Furniture, lined with drab cloth, and bound with Livery-lace; purple Festoons at the Windows, trimmed with silver fringe; the Body painted Batwing colour, with a white Border; the Arms painted in Mantle; carriage and wheels painted red and pic'd in the same colour as the Body: the Coach-box ornamented with an elegant Hammer-cloth, and very elegant plated Harness. We must not forget to inform our Readers that Sir Richard during the whole of the Assize provided a plentiful Table, with the choicest Wines, &c. for such Gentlemen as pleased to partake of the noble Banquet.

By 1869, the desire for ceremony among some at least had soured, and there are reports of "the parade and scramble of the commission day at the assizes."[135] The police had in many places assumed the custodial responsibilities, " . . . their experience in the management of crowds enabling them to keep order with less difficulty than usually arises in those counties where the former custom prevails."[136] Today in England:[137]

> The sleek black limousine has replaced the sheriff's gaily decorated coach and motor-cyclists his javelin men; nor does the sheriff now ride in state to greet

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[130] Mather, *supra*, note 120 at 16.

[131] Derriman, *supra*, note 127 at 115.

[132] 2 Charles II, c. 21 (1662); *see also* Mather, *supra*, note 120 at 16.

[133] Derriman, *supra*, note 127 at 116.

[134] *See* C.H. Karraker, *The Seventeenth Century Sheriff* (1930) at 186-7; the report is said to have come from the *Manchester Mercury* for 27 March 1787. *See also* Mather, *supra*, note 120 at 16.

[135] *See* Anon., "The High Sheriff" (1869) 5 Can. L.J. 58 at 59.

[136] *See* C. Churchill, *The Law of the Office and Duties of the Sheriff* (2nd ed., 1882) at 124, *and see* P.E. Mather, *A Compendium of Sheriff Law* (1894) at 478. *See also Sheriffs Act, 1887*, 50 and 51 Vict., c. 55, s. 9: "In the time of the assizes a court of quarter sessions in the county may direct a sufficient number of police constables to be employed to keep order in and within the precincts of the court of assize, and the chief constable shall comply with such direction, but if such direction is not given the sheriff shall have a sufficient number of men servants in liveries attending upon him for the purpose of so keeping order and of protecting the judges of assize." The Under-Sheriff of London has indicated that the High Sheriffs today are not responsible for the safety of judges.

[137] I. Gladwin, *The Sheriff: The Man and his Office* (1947) at 376. *See also* Council of the Shrievalty Association, *Guide to the Office of High Sheriff* (1979) at 14.: "Trumpeters are no longer demanded, but are considered to add dignity to the proceedings of the opening day or a legal service and should be continued if readily available."

> the judges on the boundaries of his shire, but only travels to a convenient halting place so as not to inconvenience the flow of traffic.

This is a rich history and one should not wonder that the sheriff in British Columbia in his own way attends the judges of all the courts in the Province. What one may properly wonder about, however, is the absence of any clear statement of the duties which the sheriff and his deputies are to discharge. The requirement in the *Sheriffs Act* of 1873 that the sheriff attend the judges had disappeared by 1960.[138] It was probably considered sufficient to describe him as an officer of the court,[139] although it is not clear why it was thought that one provision could do the work that two had done for so long. In any event, with the exception of section 20 of the *County Court Act*,[140] there is no express statutory requirement that the sheriff attend the judges.

The description of the sheriff as an officer of the court seems sufficient to impose the responsibility to provide security in the precincts of the court. As Fox has said:[141]

> . . . some powers are inherent in courts[:] power to insist on the provision of a roof to keep out the weather and suitable furniture and the required officers, and power to preserve order to cause a disturber of the proceedings to be removed from the Court . . . .[142]

If these powers are inherent, then it must follow that orders made in pursuance of them can be enforced, and the sheriff is the one to enforce them.[143]

It is less clear today whether the sheriff is obligated to meet the judges who go on circuit.[144] One might also wonder whether it is inherent in a judge's powers that he can order himself to be transported. In these times, an order of that kind is unlikely, although it is not inconceivable that a judge who has pressing judicial duties elsewhere may become stranded in bad weather in a rural community some distance from means of public transport. This of course is a question on the highest academic level. In many places in the Province, the deputy sheriffs do meet the judges at the airport and are happy to transport them, but the service is not provided everywhere[145] and there are judges who prefer to make their own arrangements.[146] And so times change.[147] Still, the local managers attend the opening of the Assize in their towns and should arrive in their morning suits.[148]

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[138] It was still there in 1888 (*see Sheriffs Act*, C.S.B.C. 1888, c. 106, s. 25) and in 1897 (*see Sheriffs Act*, R.S.B.C. 1897, c. 172, s. 21.).

[139] *See Sheriffs Act*, R.S.B.C. 1960, c. 355, s. 23.

[140] R.S.B.C. 1979, c. 72.

[141] *Supra*, note 4 at 162.

[142] *See also Oswald's Contempt of Court*, *supra*, note 11 at 70: "The Sheriff or the officers responsible for the care of the Courts may be dealt with as for contempt upon neglecting their duties . . . ." *Quaere* the extent to which this comment is applicable where the office of sheriff is a department of the public service. And who would be committed?

[143] *The King* v. *Lydford*, *supra*, [1914] 2 K.B. 378 (C.C.A.).

[144] *See Supreme Court Act*, R.S.B.C. 1979, c. 397, s. 26: ". . . a judge shall take circuits for the transaction of all business of the court as is practicable and in the interests of parties and the convenient administration of justice to dispose of on the circuit . . . ." The Under-sheriff of Kent for 1887 is reported as having said that he thought a sheriff had once been fined for taking only a one horse carriage to meet a judge: *see* the evidence of Frederick Scudamore in the Minutes of Evidence accompanying the *Report from the Select Committee of the House of Lords on High Sheriffs*, *supra*, note 120 at 111.

[145] Are the deputies who do not arrange to meet the judges liable to be fined or committed? Or their superiors, for not instructing them about what to do? *See Oswald's Contempt of Court*, *supra*, note 11 at 70-1.

[146] In Vancouver, the Supreme Court Judges who go on circuit are driven to and from the airport by the Chief Justices's driver, who is not an employee of sheriff services. He is employed and paid by the provincial government. His wages are drawn from the budget for "judicial administration" which the Chief Justice manages. The Province of Ontario supplies a limousine service for Supreme Court and Court of Appeal judges except during the Long Vacation: *see Ferguson*, (1982) 140 D.L.R. 542 at 544.

[147] None of the sheriffs in Alberta, Manitoba, Ontario or Newfoundland receives the judges on circuit, although in Newfoundland the judges are accompanied by a Crier and Tipstaff and sometimes by a local deputy sheriff. In Prince Edward Island there is no "circuit" and the same is true for Tasmania. But the judges are met and looked after in one way or another by the sheriffs in England, South Australia and Queensland. In New South Wales, the job has fallen to honourary deputy sheriffs, who are usually prominent local citizens. The practice has been discontinued in Western Australia. There is no greeting or ceremony in the Province of Transvaal, Republic of South Africa.

[148] In Province of British Columbia, Ministry of Attorney General, *Sheriff Services Operating Manual* at chapter 3, pages 45-47, instructions are given for opening and closing the Supreme and Country Court Assizes.

2. COURT SECURITY[149]

(a) The Practice

The more important responsibility under the head of attending the judges is the duty to provide security in and about the courthouse.[150] Prisoners, the public and everyone engaged in helping with the administration of justice — from judges to cleaners — are entitled to feel secure when they go to the courts and are entitled to be protected from harm and from the possibility of death.[151] In British Columbia, since 1974, deputy sheriffs have replaced policemen as the officials responsible for ensuring that protection is adequate.

In the Court of Appeal in this Province, about 40 per cent of the criminal cases involve argument by prisoners who appear in person. Deputy sheriffs escort the prisoners from the Law Courts lock-up into the proper courtroom, remain with them as their cases are argued and then return them to the cells if their appeal is dismissed or if judgment is reserved. There are no deputy sheriffs or sheriffs' officers in attendance when prisoners are not in the court. They are not there because they are not wanted. The Chief Justice of the Province has indicated that he would prefer that at least one deputy be in attendance whenever any division[152] of the court sits. "There is," His Lordship has said, "an increasing problem with staff shortages." However, the court is "reluctant to compel attendance," although it is properly believed that the power exists to do so if necessary.

In the County Courts and in the Supreme Court of British Columbia, deputy sheriffs do not attend the judges on civil cases, except in connection with their jury management duties. On the criminal side in the County Courts, the deputies do not attend on summary conviction appeals unless the appellant is a prisoner. If he is, the judge or a court clerk will call for a deputy. For "speedy trials," which are not jury cases, a sheriff's officer is always in attendance to carry books and papers and to escort the judge to and from the judge's chambers. In the courtroom, one deputy sheriff is always present to guard the accused person, whether or not that person is a prisoner. If a number of people are jointly charged, then more deputy sheriffs will be required; the number is determined by the judge, in consultation with sheriff services, having regard to the apparent risk.[153]

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[149] The sheriff is responsible for courtroom security in Saskatchewan (jury cases only), Manitoba, Ontario and New Brunswick, and in the superior courts at Edmonton in Alberta (police ensure secure arrangements in the Provincial Court, and in the superior courts outside Edmonton the job is done by court orderlies under the supervision of the clerk of the court). In Nova Scotia, the sheriff is responsible for security in the Supreme and County Courts only, but will go to the Provincial Court on request. In Newfoundland, the work in all courts is left for members of the force of Royal Canadian Mounted Police. Macers attend the judges of the High Court of Justiciary (the highest criminal court) in Scotland. The police are responsible for security in the Province of Transvaal, Republic of South Africa, and in Western Australia. In Queensland and in the Supreme and District Courts of New South Wales, the sheriff provides protection. In the State of Victoria, the sheriff has the general responsibility, but "no real security procedures are in force." Policemen are rostered "as a matter of course." However, "formal security arrangements are made only in special cases where some evidence suggests it to be necesary." The question of security in Victoria is under investigation and it "is clear that the Sheriff will be involved more directly . . . in the future." In England now, the tipstaff provides protecton: *see* D.F. Martin, *Study of the Profession of Huissiers de Justice*, a report prepared for the Council of Europe, Fellowship for European Legal Studies and Research (September 1980) at section 5.

[150] The sheriff should provide the same protection when a view is taken: *see R.* v. *Whalley*, (1847) 2 Car. & K. 376, 175 E.R. 155 at 157, where: "The jury, accompanied by the under-sheriff and the chief constable of the county, and attended by twenty policemen and twelve javelin men, went out of Court and went to the place at which the prosecutrix alleged that the offence had been committed."

[151] There was a recent fatal shooting in the Supreme Court of Victoria arising out of a civil case, and in recent years, two lawyers have been shot and killed in court buildings in Toronto. It is doubtful whether s. 13 of the *Supreme Court Act*, R.S.B.C. 1979, c. 397 and s. 35 of the *Provincial Court Act*, R.S.B.C. 1979, c. 341 affect the sheriff's duty to keep order and to protect the judges and others who come to court. These sections prescribe that the Attorney General is responsible for the "provision, operation and maintenance" of court "facilities" but no specific reference is made to protection of people.

[152] By s. 13 of the *Court of Appeal Act*, S.B.C. 1982, c. 7, the court "may sit in one or more divisions, each composed of not fewer than three justices . . . in either or both of Victoria and Vancouver."

For criminal jury trials in the County Courts and in the Supreme Court of British Columbia, two sheriff's officers attend to care for the jury panel. Once the jurors are sworn, only one officer is needed, unless the jury is sequestered, in which case two officers are again required. One deputy sheriff is present whether the accused is a prisoner or not. More deputies are needed if there are several accused. In addition, one armed deputy sheriff attends to escort the judge to and from the courtroom and to sit in the well of the court to watch over the gallery. No policemen attend for the purpose of ensuring protection, although they are often present as witnesses and will therefore be near the courtroom if they have not yet testified or inside it in the public area if they have. There is no doubt that they would provide assistance if the occasion demanded it, but they are not always there.

The number of officers and deputies listed for the Supreme and County Courts is the number which the judges feel to be the minimum requirement.[154] Again, the problem is one of a shortage of available deputies. The court services division of the Ministry of Attorney General has been made aware of judicial concerns about whether protection is adequate.

In the Provincial Court, where there is one deputy for each trial court and sometimes several in the remand courts,[155] availability of deputies does not appear to be a problem. In fact, the general belief among the judges seems to be that too often the deputies sit idle.[156] One Judge of the Provincial Court said:

> . . . the sheriffs provide adequate security in situations that are potentially explosive, [but] it is wasteful for a sheriff's officer[157] to be present throughout all court proceedings. Many judges throughout the province are excusing sheriff's officers from the courtroom when the hectic first appearances and arraignments are completed and trials have commenced.

This Judge shares the opinion of the superior court judges that the judges must decide what protection is adequate but argues that in Provincial Court, as long as a deputy is available for each judge at the beginning of the day, the need for security could be met and those deputies who were not needed could be excused to do other work:[158]

> If the decision were made by some other member of the court staff in advance, which would certainly be desirable from the point of view of maximizing the

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[153] *See* an excerpt from the transcript of the proceedings of *R.* v. *Andrews et al.*, Vancouver, 10 April 1975, a criminal case in the Provincial Court of British Columbia in which His Honour Judge Beirnes gave effect to the submission of counsel for the Crown and refused to order that shackles be removed from the prisoners who had been brought into the courtroom. Crown counsel had mentioned a case in the Supreme Court — *R.* v. *Beaman and Moisie* (Unreported) — where Mr. Justice Macfarlane was said to have ". . . felt that it was the responsibility and therefore must be left as a discretionary matter in the authorities, that is, the Sheriff, with respect to the problem of security in the courtroom, and that the Sheriff must be responsible for taking what measures he deemed appropriate."

[154] A judge of the Supreme Court wrote to say that ". . . while protection is excellent in major cases, the risk is very high in many less high profile cases where protection is presently often quite inadequate."

[155] In France, in the equivalent court, there is "massive security. No single Sheriff's officer, but two policemen inside the vestibule [entry way], a police corporal in the body of the court, and one officer for every accused in the box. All armed, I may say:" *see* P. Collings (himself a Provincial Court judge), "Un Jour Aux Chambres Correctionnelles" (1981) 39 The Advocate 35.

[156] Apart from calling out the names of required witnesses, the only other job the deputies do in the courtroom is to process documents relating to people who have been convicted of offences but who have not been sent to jail.

[157] In fact, the employees of sheriff services who work in the Provincial Court in the Province are "deputy sheriffs."

[158] *Quaere* which of two court duties takes priority. In *Casely* v. *Weston*, (1724) Hob. 265, 80 E.R. 410, a sheriff was fined for having failed to arrest one Bradshaw on a *capias utlagatum* [". . . a writ of execution founded upon a judgment of outlawry, or of waiver, pronounced by the coroner in the County Court, or by the Recorder of London in the Court of Hustings: *see* G. Atkinson, *Sheriff-Law* (3rd ed., 1854), at 208]. The sheriff was "attending upon the Judges of Assise, from the church to the hall" when he saw Bradshaw, but he "did not endeavour presently to take him, whereby he then escaped." If "presently" meant forthwith and not soon, then the case suggests that the work of execution takes priority over the duty to attend the judges. That may be significant for the director of sheriff services, to the extent that it gives him guidance in deciding what to do with the limited number of deputy sheriffs he has at hand. Surely, however, security must take precedence.

> productivity of a sheriff, the judge would be completely compromised in the event he felt uncomfortable in a situation and that no sheriff had been assigned to cover the court that day.

It is really a question of determining what "productivity" is. For judges in the superior courts, where there is usually more at stake for the accused, and where the risks are usually higher, a deputy sheriff is "productive" merely by being present, even if he might appear to onlookers to be idle. The analogy to firemen is apt.

The decision about how many deputies should be present in any courtroom in the Province must ultimately rest with the judges. It is not fair to expect them, or any other persons assisting with the administration of justice to be "uncomfortable" when they discharge their duties. No judges appear to have set unreasonable requirements and there are unlikely to be individual judges who do so. If one can entrust the determination of guilt or innocence to the judges, then certainly one can expect them to exercise good judgment in making security arrangements.

The question of adequate security does not end with the decision about "who requires how many." It extends to capability, and so to training and to appointment. The general opinion among the judges seems to be that the deputies are properly trained. As one judge of the Provincial Court put it: " . . . the sheriffs respond quite adequately to security situations, perhaps with an over abundance of caution, but not unreasonably." But one of his colleagues thought differently:

> I feel very few of them are in a position to offer any real protection in case of emergency. I know that there are usually policemen about, but I think we may be thankful that emergencies seldom, if ever, arise.

This comment echoes the remark of a superior court judge who thought that his court generally got untrained deputies and who said he would be happier with "tested" ones.

These divergent comments may or may not point out the need for better training of deputy sheriffs, but it is certainly evidence of a need to employ the right people to attend the judges. It is not only a question of providing a burly or heavily armed deputy. It is a question of providing a deputy who knows his judge or judges and has their confidence. These requirements, together with the obvious need in deputies who do execution work that they have common sense and good judgment, leads to a conclusion that a peculiarly sensitive person is required to do the work of the sheriff in the Province. It is not clear that the "model" — the retired policeman or military man — , to which sheriff services has in the past looked, is the proper one. To the credit of sheriff services, younger and better educated deputies are often appointed these days.

(b) Preserving Order

Section 20 of the *County Court Act*[159] provides that every:

> . . . sheriff for the county or portion of a county in which a court is held shall exercise the authority of a constable during the actual holding of the court, with full power to prevent breaches of the peace, riots or disturbances within the courtroom or building in which the court is held, or in public roads, streets, squares or other places within the hearing of the court, and may, with or without warrant, arrest all persons offending against this section, and immediately bring the offenders before the judge or before any other judicial officer having power to investigate the matter, or to adjudicate on it.

This provision seems to add nothing to the law. It may have been included in the Act to overcome the decision in *Tunno* v. *Morris*,[160] and to ensure that the sheriffs who attended the County Court judges would have the same duties as the sheriffs in the superior courts had at common law and as officers of the court. Sheriffs and deputies are now "peace officers" for all purposes[161] and they are officers of all the courts.[162] This renders section 20 unnecessary. Nor does the provision impose a new requirement that the sheriff act where no judge's order has been made. There seems to be little doubt that at common law it was the sheriff's duty, in cases of commotion, to act on his own initiative to prevent disturbances, however large or small.[163]

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[159] R.S.B.C. 1979, c. 72.

[160] *Supra*, note 100.

The responsibility to keep order seems to be undoubted. In *Re The Sheriff of Surrey*,[164] Mr. Justice Blackburn had been bothered one day while sitting in Surrey by the noise of people " . . . walking about in a covered place, between the Court and the street,[165] separated from the Court by a railing only, and otherwise open to it on the one side, and the street on the other."[166] He ordered the place to be cleared, and it was done, but the sheriff who was present did not help. Not long after, a placard was posted outside the court in which Blackburn J. sat. It read:[167]

> TO THE FREEHOLDERS AND INHABITANTS OF THE COUNTY OF SURREY.
>
> Gentlemen, — On Friday, the 3rd of August, Mr. Justice Blackburn, in my presence, but without addressing himself to me, ordered that part of the Court which is appropriated to the public to be cleared, at a time when perfect quietness prevailed among the public, who were there present according to custom. From that time the public have been barred out from the Court where Mr. Justice Blackburn presides, and the prisoners have been tried and causes heard without the possibility of the law being fulfilled, which requires that 'so many as will or can' shall 'come so near as to hear.' As your sheriff, and feeling that the general dissatisfaction is well-grounded, it is my duty to record my protest against this unlawful proceeding; and I have given directions that the Court shall be opened again to the public, according to the custom and the law. All persons, so long as they conduct themselves with decorum, have a lawful right to be present in Court; and I hereby prohibit my officers from aiding and abetting any attempt to bar out the public from free access to the Court.
>
> I am, Gentlemen, your faithful servant,
>
> WILLIAM JOHN EVELYN, Sheriff.

This action provoked a response from Chief Justice Cockburn who is reported to have discussed the incident with the Lord Chancellor, Lord Campbell. The sheriff was then summoned before the Chief Justice. He admitted that the placard was his. He was not sorry. He thought the judge had acted illegally and he "felt bound to disobey, as the chief officer of the county."[168] Chief Justice Cockburn was not amused. His Lordship said, with obvious force:[169]

> Mr. High Sheriff, the Court has heard with anxiety and sorrow the statement which you have addressed to them, amounting, as it does, to an entire justification of what we, as her Majesty's Judges of Assize, sitting as the representatives of the sovereign, feel to be a most improper, unlawful, and unseemly contempt of our office, and of the administration of justice. Mr. High Sheriff, you have most

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[161] *See* the *Criminal Code*, R.S.C. 1970, c. C-34, s. 2 and *see* the discussion of the sheriff as "peace officer" in Chapter V.

[162] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 5.

[163] *See In re The Sheriff of Surrey*, *supra*, note 125 at 1041, *per* Cockburn C.J.: "It was your duty, Mr. High Sheriff, to take all necessary means to preserve . . . quiet, and to set the example of obeying an order which the Judge might give for that object." Among other things, the sheriff in British Columbia should ensure that no photographs are taken in a courtroom. *See* Court Services Circular 10/79, 29 November 1979.

[164] *Ibid.*

[165] Of the accommodations, the reporter wrote: "The courts in this county being in this and every other respect remarkably incommodious, and ill-adapted for the due administration of justice, as the Lord Chief Justice, at this Assizes, and other Judges, on former Assizes, have complained." *See* footnote (b) at 1039, of the report of *In re The Sheriff of Surrey*, *ibid.*

[166] *Ibid.* at 1039.

[167] *Ibid.* at 1040.

[168] *Ibid.*

[169] *Ibid.* at 1040-1.

> unquestionably mistaken both the law and the facts. You have mistaken the law, for the power and authority of her Majesty's Judges, acting in pursuance of her Majesty's commission, are perfectly well defined and established, and the course taken by my learned Brother was one which he had the most undoubted right to adopt. It is at once conceded that English Courts of Justice are open to the public in the fullest sense, and I trust they ever will remain so; but it is going far beyond either law or necessity to avow, as you Mr. High Sheriff have done, that there is no power reposed in the presiding Judge to order such modifications of the arrangements of the Court as are indispensable to that which it is the office of a Judge to carry out: viz., the efficient administration of justice.[170] You are equally mistaken, Mr. High Sheriff, as to the facts. The truth is, that no part of what is properly to be called the Court was ordered to be cleared. The fact is that my learned Brother ordered the lower part of the Court, open to the street, and not the other parts of the Court, to be cleared, because the examination of witnesses in criminal cases, when prisoners were standing on their trial, was inaudible to the Court and jury, and there was surely a transparent necessity for the order which my learned Brother conveyed to the officers of the High Sheriff. But, even were it otherwise, it is undoubtedly in the power of the Judge, in his discretion, to order the Court or any part of it to be cleared if due quiet is not preserved. It was your duty, Mr. High Sheriff, to take all necessary means to preserve such quiet, and to set the example of obeying an order which the Judge might give for that object. You, Mr. High Sheriff, had not made the least complaint or remonstrance before you left the assize town, and yet thought fit to issue this placard and have it posted on the walls of the Court while the Judge was still sitting, openly inviting your officers to disobey any future orders of the same kind which he might give. You have stated, and of that the Court is perfectly assured, that you, as an honourable English gentleman, neither have intended, nor are capable of offering, any personal indignity to her Majesty's Judges; but the course which you have pursued is clearly a contumacious contempt of the Court, and a most serious reflection upon the authority of the Judges' commission, which emanated from the Crown, and demands, especially from the High Sheriff, as one of her Majesty's most important officers of justice, obedience and respect. I consider it my duty, Mr. High Sheriff, to fine you £500.

The note of the reporter reads: "The sheriff therefore had either been guilty in the first place of a neglect of duty in not keeping silence, if he could, or if he could not, then the clearance of the Court ordered was necessary."[171]

It is not clear whether the sheriff may call on the police for assistance when he needs it. A former undersheriff for Norfolk was asked by the House of Lords Select Committee in 1888 whether " . . . the sheriff himself, or through his undersheriff exercised control over the police when they are in courts." The reply given was:

> Yes, the deputy superintendent has always come to me for orders, and for the time is nominally my servant, instead of the servant of the chief constable.

This answer suggests that the sheriff has an absolute power over the police, at least when they are already in court,[172] and perhaps even if they are not.

It would be desirable to clarify, by statute, the question of what help the sheriff is entitled to have.

(c) The Power to Search

Can a sheriff search people who are coming into court? Obviously the power to search is a useful preventive measure, and it is one the sheriff should have. In fact, the sheriff does appear to have the power, both under statute[173] and at common law. As the officer responsible for ensuring that the judge is protected, it must follow that he have the necessary means to discharge the duty. And one of those means must be the power to search. He undoubtedly has the power and the duty to search if the judge orders him to do so. It follows from the judge's power to exclude people from court where there is a "just apprehension"[174] of disorder that the judge may also impose conditions on the right of entry. One of those conditions, assuming it would be reasonable in all the circumstances, could be submission to search. In practice, in British Columbia, searches by the sheriff of people coming into certain courtrooms are made in some cases, but only after consultation with the presiding judge or with the Chief Justice.

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[170] *See also* the comment of Earl Loreburn in *Scott* v. *Scott*, [1913] A.C. 417 (H.L.) at 445: ". . . the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impractical, the exclusion of the public in general." *See, generally, R.* v. *Stone*, (1796) 6 T.R. 527, 101 E.R. 684; *Morris* v. *Crown Office*, [1970] 2 Q.B. 114 (C.A.).

[171] *See* footnote (a) at 1041-2, of the report of *In re The Sheriff of Surrey*, *supra*, note 125.

[172] In practice, the sheriff and the police work together. *See, e.g.*, Frail, "Courtroom Crisis Management" (1982) *Forum* (Issue 1) at 4 for an account of a "cooperative effort between deputy sheriffs and the Vancouver Police Emergency Response Team" who "subjected the Vancouver Law Courts to a mock hostage-taking incident." It would, of course, be fatuous for the sheriff to ignore the special training which a police team like this one has undergone.

To make it clear that the sheriff has the intrusive power of search, express provision should be made for searches in the *Sheriff Act*, that power to be exercisable only on the direction of a judge.[175] The qualification on the exercise of the power would prevent unreasonable and unjustifiable searches and would ensure that the power was not used as a means of discouraging people from coming to court. A formal application to a judge should not be necessary. It would be sufficient if the judge were simply apprised of potential dangers. In that way, ultimate control of searches would rest with the judiciary.[176]

C. The Enforcement Process

1. THE KINDS OF COMMANDS

An especially unfortunate "judgment"[177] debtor in British Columbia might find a deputy sheriff at his door one day claiming authority under a warrant and under four kinds of writs to seize the debtor's personal property with the object, in the end, of selling it to recover what is owed to the creditor.

The deputy might first produce the warrant of execution for which provision is made in section 27 of the *Small Claim Act*.[178] That warrant must be issued by a judge of the Provincial Court when its issuance is requested by a judgment creditor who has obtained an award for "debt, damages or costs." It is not clear why the term "warrant" was chosen in preference to "writ." "Writ" certainly has the historical claim to usage.[179]

The writs under which the deputy might purport to levy execution are the writ of seizure and sale mentioned in Rule 42 (1) of the Rules of Court, the writ of attachment named in section 12 of the *Woodworker Lien Act*,[180] the writ of *fieri facias* described in Rule 1900 of the *General Rules and Orders* of the Federal Court of Canada, and the writ of *fieri facias* which issues under section 705 (3) of the *Criminal Code*.[181]

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[173] As a "peace officer," a deputy sheriff could make a search for some weapons under s. 99 (1) of the *Criminal Code*, R.S.C. 1970, c. C-34. This provision is too limiting insofar as court security is concerned.

[174] *Scott* v. *Scott*, *supra*, note 170 at 445.

[175] One can envisage cases of extreme risk which would require searches at the doors to the court building, rather than just at the entrance to a courtroom, and the proposal is made with that possibility in mind.

[176] In the State of Victoria, where there is "considerable opposition" within the legal profession and from civil liberties groups to the extension of the power to search generally, "no such opposition exists in respect to the Sheriff being granted such powers in Court precincts." [Letter from P. Duncan, Deputy Sheriff].

[177] The word "judgment" is qualified with quotation marks because there are circumstances in which a sheriff may be directed to levy execution where the creditor has not obtained a judgment in the usual way or in the usual form. *See* Appendix B.

[178] R.S.B.C. 1979, c. 387. There is no statutory form for the warrant although, despite s. 4 (1) of the Act, a printed form is used in practice. It does not resemble the form of writ of seizure and sale used in the superior courts (*see* Rule 42 (1) and Form 42 to Appendix B of the *Rules of Court*), even though s. 4 (2) directs those wanting precedents to use what is used in the County Courts. Form 42 is used there: *see* s. 89 of the *County Court Act*, R.S.B.C. 1979, c. 72.

[179] *See* the discussion of the history of writs in the next part of this section and *see* note 178 *ibid*.

[180] R.S.B.C. 1979, c. 436.

[181] R.S.C. 1970, c. C-34.

The provincial writ of seizure and sale is the command most frequently addressed to the sheriff.[182] It is one of the "writs of execution" to which the provisions of the *Court Order Enforcement Act*[183] apply. That *Act*, in conjunction with the Rules of Court, governs the process of enforcing judgments in the Province.

The writ of attachment for woodworkers is a curiosity. At common law, "attachment" was a process like, but not quite the same as, committal for contempt. It is not clear how the word came to be used in the *Woodworker Lien Act*.[184] In any event, the writ commands the sheriff "to attach, seize and take and safely keep"[185] and ultimately sell[186] logs and timber over which a woodworker claims a lien.

The writ of *fieri facias* in the Federal Court of Canada will issue on the written request of a judgment creditor[187] for whom a judgment or order has been made.[188] This writ is to be executed — apart from sale — according to the federal Rules. Sale may be governed by provincial laws.[189] The other federal writ is the one to be delivered by the clerk of the court to the sheriff under section 705 (3) of the *Criminal Code*[190] where a judge of the Provincial Court orders forfeiture of a recognizance. When the order is made, the principal and his sureties become judgment debtors of the Crown. The sheriff is "to execute the writ and deal with the proceeds thereof in the same manner in which he is authorized to execute and deal with the proceeds of writs of *fieri facias* issued out of superior courts in the province in civil proceedings."

There is little reason why there should be so many forms of command when all of them are designed to accomplish the same thing. Some differences are perhaps inevitable in a federation, but there is no justification for variations within one Province. Below, the abolition of any kind of special command to the sheriff is proposed. But if that proposal is not acceptable, then a single form of command should be adopted. The name "writ of seizure and sale" is as good a name as any for the direction. It should issue in appropriate circumstances from all the courts in the Province.

2. THE IDEA OF A SPECIAL COMMAND

The variety of the forms of command raises the question of why there should be a special command to the sheriff at all. It seems odd that in inflationary times, when frequent complaints are made about governmental and judicial inefficiency, there should be two pieces of paper to do a job where one would be enough. Why are both an order from a court *and* a writ or warrant necessary; why not incorporate the command in the order?

To those familiar with the history of the office of the sheriff, it may seem surprising to suggest the abolition of writs of execution.[191] Writs — of whatever kind — have been "an instrument of government"[192] since the tenth century. They were an essential and sensible tool:[193]

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[182] It is ". . . the maid of all work in the law of execution:" *see* G. V. LaForest, "Some Aspects of the Writ of Fieri Facias" (1959) 12 U.N.B.L.J. 39 at 39.

[183] R.S.B.C. 1979, c. 75. Section 42 defines 'writ of execution' to include "a writ of seizure and sale, sequestration and attachment, and any subsequent writ that may issue for giving effect to it, a warrant or other process of execution sued out of a County or Provincial Court having jurisdiction to grant and issue warrants or process of execution."

[184] R.S.B.C. 1979, c. 436.

[185] *Ibid*. s. 12.

[186] *Ibid*. s. 23.

[187] *General Rules and Orders* of the Federal Court of Canada, Rule 2005 (2). *See also* Form 56 in the Appendix to the Rules.

[188] *Ibid*. Rule 1900.

[189] *Ibid*. Rule 2108.

[190] R.S.C. 1970, c. C-34.

[191] The remarks and proposals in this section are made in the context of the discussion of the writ of seizure and sale or its equivalent but they apply with equal force to all kinds of writs of execution, including writs flowing from "deemed judgments:" *see* Appendix B.

> The link between king and sheriff was provided by the most original of all Anglo-Saxon inventions, the writ. Why was it so original, when it was just a 'writing', a written order? Because nowhere else in medieval Europe was there such a tradition of austerely succinct and practical letters, without which efficient bureaucracy is impossible; letters which could therefore be sent in their hundreds to more or less illiterate lay officials. In early medieval Europe, Latin was the only intellectually respectable language to write. So the clergy learnt to write Latin and laymen remained illiterate. In England, however, there had been 'official' use of the vernacular since Ethelbert's[194] laws; and the decay of Latin learning accompanying the attacks of the Norsemen may have compelled the writing of letters in English, which were certainly passing between lords and their servants in King Alfred's time. Along with Latin, the letter jettisoned the elaborate formality seen in the charters of the period.
>
> In fact, Latin charters of the old type were eventually replaced by 'writ-charters', and these make up almost all the pre-Conquest writs which survived, preserved in the 'cartularies' of the monasteries to which they brought new property. The writ-charter shows us the writ's advantages. It was usually addressed to the sheriff for proclamation in the shirecourt, where any disputes about the property would have to be heard; and it omitted, for instance, the tremendous and space-consuming anathema clauses of the old charter, which enumerated all the supernatural punishments awaiting anyone who did not respect the provisions of the grant. Instead of a long string of witnesses, a seal authenticated the document. Almost the only purely formal aspect of the writ was its simple beginning: 'King Harold sends friendly greetings to . . . and I inform you that . . . .' It was all so much cheaper than the old charter, because it was so much smaller — a piece of parchment only 8 ins. by 4 ins. might be sufficient for a writ.

From being a purely executive direction, writs grew to become a useful device for the courts, as evidenced by chapter 18 of the Second Statute of Westminster:[195]

> When Debt is recovered or knowledged in the King's Court, or Damages awarded, it shall be from henceforth in the Election of him that sueth for such Debt or Damages, to have a Writ of *Fieri facias* unto the Sheriff for to levy the Debt of the Lands and Goods; (2) or that the Sheriff shall deliver to him all the Chattels of the Debtor (saving only his Oxen and Beasts of his Plough) and the one half of his Land, until the Debt be levied upon a reasonable Price or Extent . . . .[196]

Today, the issuance of writs of execution seems anachronistic. The conditions which prompted the "invention" of writs have long since disappeared and there are no new reasons which make writs of execution either essential or sensible instruments. It is now "much cheaper" just to deliver the judge's order. Moreover, the members of the public whom the sheriff is supposed to serve are confused by the necessity for two documents. For example, not too long ago a young man presented his Small Claim Division judgment to the execution specialist in the sheriff's office in Prince George. He wanted the debtor's motor vehicle seized. He was told that he had to return to the Small Claim Registry in order to obtain a warrant and that no action could be taken until that was done. Why waste the time of the deputy, the creditor and the Small Claim clerk?

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[192] A. Harding, *A Social History of English Law* (1966) at 29.

[193] *Ibid.* at 28-9. *See also* F. W. Maitland, *The Forms of Action at Common Law* (1909) at 16: "From time to time [the king] interferes with ordinary litigation; at the instance of a litigant he issues a writ commanding a feudal lord or sheriff to do justice . . ." *And see* M.M. Bigelow, *History of Procedure in England from the Norman Conquest* (1880), at 151: "The king's writ is here seen in its most advantageous light. There was no way, without the royal mandate, of compelling the local courts to do justice on behalf of their suitors; and to require parties to resort to the King's Court in case of failure of justice at home would have resulted, often, in the total defeat of a just demand."

[194] Ethelbert was king from 860 to 866: *see* G.S.P. Freeman-Grenville *The Queen's Lineage* (1977) at 4.

[195] 13 Edw. I, Stat. Westm. 2, c. 18 (1285).

[196] It is said by almost everyone that the writ of *fieri facias* lay at common law: *see e.g.*, *Sir Will. Harberts Case* (1585) 3 Co. Rep. 11; Co. Inst. 290b; W. Tidd, 2 *The Practice of the Courts of King's Bench and Common Pleas* (9th ed., 1828), at 993; and La Forest, *supra*, note 182 at 39. *But see* M. Bacon, 3 *A New Abridgement of the Law* (7th ed., 1832) where it is said at 387: "The *fieri facias* and *levari facias* are judicial writs which lay at the common law," but the statement is qualified in footnote (a) in this way: "This is certainly the common language of our law-books; and as *Glanville* and *Bracton* are wholly silent about execution in personal actions, there is no direct authority either to contradict or support this opinion. It seems, however, doubtful, whether these writs *eo nomine* are of such ancient date . . . From the mere penning of [13 Edw. I, Stat. Westm. 2, c. 18 (1285)] the *fieri facias* appears as much a new regulation as the *medietatum terrae* [writ of elegit]."

It does not mean, just because a judgment or order contains a direction to the sheriff to levy execution, that the creditor must instruct the sheriff to levy. The creditor will still have the election to execute or not. There is no magic in the current form of writ anyway.[197] Both section 28 (1) of the *Interpretation Act*[198] and Rule 4 (1) of the Rules of Court permit variations in the form where necessary and the decision in *Boswell* v. *Coaks*[199] confirms that it is the judgment, not the form of writ, which is important: " . . . the forms should be followed, having regard, however, to the directions contained in the judgment or order itself . . . .,"[200] and a writ of execution which "does not conform with the judgment on which it purports to be based" is irregular.[201]

It is therefore proposed that all writs of execution be abolished and that they be replaced by directions to the sheriff contained in the judgment or order in which the creditor's award is made.

The abolition of a writ of execution should not be regarded as a novel or surprising development. There has been no writ of elegit or of *fieri facias de terris* in British Columbia since 1899.[202] The work of those writs is now done by an order of the court under section 88 of the *Court Order Enforcement Act*.[203] British Columbia would not be the first jurisdiction to consider a change of the kind proposed. In 1974, the Law Reform Committee of South Australia made a similar suggestion.[204]

It should be emphasized that it is not being suggested that execution as a means of enforcement should be abolished. As the Evershed Committee pointed out, there must be something available which is "extremely unpleasant" for the judgment debtor.[205] The proposal is aimed at simplifying the procedure for initiating the process of execution.

It should be mentioned that the duty of the sheriff to enforce civil judgments is not imposed by the *Court Order Enforcement Act*,[206] as one might expect, or even by the *Sheriff Act*.[207] Instead its source lies in forms contained in Appendix A to the *Rules of Court*. Section 49 of the *Court Order Enforcement Act* provides that a debtor's goods, chattels and effects are "liable to seizure" but, with the exception of cash and of securities for money like cheques and bills of exchange (which the sheriff is required to seize under section 52), there is no direction in the Act which would require a sheriff to do anything at all when a writ of execution is delivered into his hands. Nor do the Rules themselves raise the duty. The sheriff is hardly mentioned in Rule 42, which governs enforcement of orders. Instead, the duty is fixed by Forms 42 through 46, which command the sheriff to take the steps which each form outlines. So it is in this indirect way that provision is made for commanding the sheriff.

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[197] In *Bullen* v. *Moodie*, (1863) 13 U.C.C.P. 126 at 135, the Court said that the direction to the sheriff ". . . may either be embodied in the order or . . . may be appended to it."

[198] R.S.B.C. 1979, c. 206.

[199] (1887) 36 W.R. 65 (C.A.).

[200] *Ibid.* at 66 *per* Cotton L.J.

[201] *See In re Langstaff Estate*, [1923] 3 W.W.R. 626 (Sask.K.B.) at 627; *and see Webber* v. *Hutchins*, (1841) 8 M. & W. 319 151 E.R. 1060 *per* Parke B.

[202] *See Execution Act Amendment Act, 1899*, S.B.C. 1899, c. 27, s. 2.

[203] R.S.B.C. 1979, c. 75.

[204] *Thirtieth Report of the Law Reform Committee of South Australia to the Attorney General*, (1974) at 4, 5. In the *Report of the [Payne] Committee on the Enforcement of Judgment Debts*, Cmnd. 3909 (1969) at para. 656, a recommendation was made that the writ of *fi.fa.* be abolished. The recommendation was made as part of a wider proposal to establish an Enforcement Office in England. Nothing has yet been done to implement that proposal.

[205] *Final Report of the Committee on Supreme Court Practice and Procedure*, Cmnd. 8878 (1953) at para. 399.

[206] R.S.B.C. 1979, c. 75.

[207] R.S.B.C. 1979, c. 386.

At common law, there is no doubt that the sheriff was responsible for executing the court's writs. He had that duty no later than the reign of Edward I.[208] There was no doubt of it in Watson's mind in 1848,[209] and in 1854, in *McWhirter* v. *Corbett*,[210] the duty was recognized in Canada. The scope and the consequences of this duty are described in the next chapter.

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[208] Morris, *The Medieval Sheriff to 1300* (1927) at 210-11. Edward I ruled from 1272 to 1307: *see* G.S.P. Freeman-Grenville, *The Queen's Lineage* (1977) at 12.

[209] Watson, *supra*, note 126 at 64-5: "In the execution of writs, the sheriff is the known, public, and responsible officer of the court, whose process he is bound to execute . . ."

[210] (1854) 4 U.C.C.P. 203; *see also R.* v. *Monkman*, (1892) 8 Man. R. 509 and *MacDonnell* v. *Robertson*, (1892) 1 Terr. L.R. 438.

CHAPTER VII

THE COURT OFFICER: EXECUTION PROCEEDINGS

A. Rights and Duties of the Sheriff in the Execution Process

In 1854 Atkinson wrote of the sheriff:[1]

> His *Ministerial* duties [as opposed to his judicial duties which are now generally obsolete both in England and in British Columbia] are at once numerous, complicated, and important to himself and others. It is especially upon these matters that book-learning is necessary to him and to his officers, for a safe and efficient fulfilment of the requirements of the law.

The largest and most important class of ministerial duties consists of carrying into effect the orders both of the courts and of all those administrative bodies whose orders on filing are by statute rendered enforceable as orders of a court.[2] Final process is issued by the court in which the judgment was obtained at the instance of the successful party and the document is referred to generally as a writ of execution, though, as mentioned in the last chapter, the exact name for a particular process may vary from court to court. For example, an order for the payment of money is enforceable by a writ of seizure and sale if the judgment was obtained in either the Supreme Court or the County Court of British Columbia,[3] but if the judgment was obtained in the Small Claim Division of the Provincial Court, the process is titled a warrant of execution.[4] Judgments in the Court of Appeal depend for their enforcement processes on the courts of original jurisdiction.[5] Federal courts and federal legislation generally still adhere to the original Latin name for the process, and so call the process a writ of *fieri facias*.

Fortunately for the sheriff in British Columbia, his rights and duties remain almost constant today for each writ regardless of the court from which process is issued. Variations in nomenclature and, indeed, the very need for a writ are problems for the execution creditor but they do not concern the office of sheriff.[6]

The factor common to each process is that it contains a command directed to the sheriff as a public officer, an officer of each court.[7] Curiously that fact now poses a puzzle for the British Columbia solicitor. The writ is directed to the sheriff but there is no sheriff of any given district. To whom should they address the writ? The advice generally given to inquiries is to fill in the blank with "sheriff services."

In the execution of civil process, the sheriff plays an independent role. He is neither performing a public duty[8] nor, though acting exclusively at the direction of the successful party, is he ordinarily considered to be an agent of that individual.[9] He is obliged to comply only with the original instruction of the successful plaintiff to execute, and not with any specific directions thereafter.

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[1] Atkinson, *Sheriff Law* (1854) at 90.

[2] *See* Appendix B.

[3] B.C.S.C. Rules, R. 42 (1), made applicable to the County Court by *County Court Act*, R.S.B.C. 1979, c. 72, s. 89.

[4] *Small Claim Act*, R.S.B.C. 1979, c. 387, s. 27.

[5] *Court of Appeal Act*, S.B.C. 1982, c. 7, s. 30.

[6] *See* discussion in Chapter VI.

[7] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 5; *County Court Act*, R.S.B.C. 1979, c. 72, s. 39; *Federal Court Act*, R.S.C. 1970, c. 10, s. 13; *Hooper* v. *Lane*, (1857) 6 H.L. Cas. 443, 10 E.R. 1368; *Humphrys* v. *Pratt*, (1831) 5 Bligh N.S. 154, 5 E.R. 269.

[8] *Creighton* v. *Sweetland*, (1898) 18 P.R. 180 (Ont. Div. Ct. affirmed O.C.A.); *MacDonnell* v. *Robertson*, (1885-93) 1 Terr. L.R. 438 (1892 N.W.T.S.C. *en banc*).

[9] *Wilson* v. *Tumman*, (1843) 6 Man. & G. 236, 134 E.R. 879. The sheriff may become an agent of the execution creditor, however, if given sufficiently specific directions. Such agency may have serious consequences for the execution creditor or for his solicitor as he will become liable for any misconduct on the part of the sheriff but it imposes no new duties or liabilities on the sheriff.

As a public officer, however, he benefits from the principle that everything done by a public officer in the execution of his duty is presumed to be rightly and duly performed: *Imperial Electric Co.* v. *Shere*, (1910) 14 W.L.R. 332 (Sask. Q.B.).

Until the early twentieth century the duties and liabilities of the sheriff with respect to the execution of civil process were a fertile cause for statutory intervention and for litigation. In the twentieth century both have been curtailed. Unless one believes that by the turn of the century both the law and the conduct of sheriff's officers and bailiffs in fulfilling their duties had reached a state of near perfection, one is left to speculate as to the causes for the decline of legislation and litigation.

One cause was undoubtedly the abolition by legislation both in England and in British Columbia of certain writs whose execution had always engendered trouble for the sheriff: the writs of *capias ad respondendum* and of *capias ad satisfaciendum*.[10] In British Columbia the sheriff was also generally relieved of many of his duties in relation to execution against land by the abolition of the writs of *elegit* and *fieri facias de terris*.[11] Indeed, the only aspect of execution against land which now concerns the sheriff in British Columbia is the actual sale. Many other writs employed in the nineteenth century are no longer provided for in the Rules of Court though whether they have been completely abolished by omission may be an open question.[12] In any event practical abolition by desuetude has obviously reduced litigation concerning the proper modes of execution by the sheriff.

Provincial insolvency legislation, the *Creditor Assistance Act*,[13] imposed new duties on the sheriff,[14] but eliminated many vexing problems concerning priorities without engendering an equivalent amount of litigation of its own. These changes in the law do account for a decrease in the general volume of litigation but they do not explain the decrease in litigation with respect to the remaining writs of execution.

Recent legislative intervention in British Columbia has taken the form of repeal of enactments concerning the sheriff: the 1976 revision of the *Sheriff's Act* replaced approximately sixty provisions with twelve and at the same time many provisions concerning the sheriff in the *County Court Act* were also repealed. The net result is that in British Columbia today the sheriff is to be guided in the execution of civil process chiefly by common law rules largely formulated before the commencement of the twentieth century with little judicial indication of how those rules and standards are to be adapted to the present circumstances.

This chapter will discuss the duties and liabilities of the sheriff in the execution process both with respect to those processes (by whatever name) which are provided for such as writs of seizure and sale, possession, and delivery and with respect to related aspects of the execution process in which the sheriff may play a role. It will also attempt to supply some part of the "book-learning" advocated by Atkinson,[15] and which surveys of sheriffs and questions from, and comments by, various members of the bar reveal is needed at all levels.

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[10] *See* C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (1981) c. 5.

[11] *See* now s. 73 *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75.

Since the mode of execution against land accommodates the land registration system in the Province, the only role for the sheriff is in respect to sale.

[12] *See* discussion accompanying note 233 ff. *infra*.

[13] R.S.B.C. 1979, c. 80. Formerly the *Creditor's Relief Act*. First enacted in 1902 this statute was designed to fill the void left by the repeal of the Federal *Insolvent Act* in 1880, a void which continued until 1919 when Parliament passed the *Bankruptcy Act*, S.C. 1919, c. 36: *see, generally*, Law Reform Commission of British Columbia, Report on Creditors' Relief Legislation (LRC 42, 1979).

[14] *See* text accompanying note 252 ff. *infra*.

[15] *Supra*, note 1.

For convenience the organization under the present *Sheriff Act* will be ignored and references throughout will be to the sheriff. For the same reason it will be assumed that the proper person to execute the process is the sheriff even though it is doubtful that he has exclusive jurisdiction over process issuing from Small Claim Court,[16] even though the *Sheriff Act* permits the appointment of persons on a temporary or part-time basis to act as sheriffs for particular specified purposes[17] in derogation of the exclusive jurisdiction it confers on the sheriff to execute a judgment summons, an order of committal, a writ or a warrant of execution issued in respect of a civil matter,[18] and even though the common law rule that the proper person to execute a writ of *fieri facias* when the sheriff is an interested party is the coroner, still applies in British Columbia.[19]

B. Writ of Seizure and Sale

An order for the payment of money is enforceable in British Columbia by a writ of seizure and sale from Supreme and County Courts, a warrant of execution from Small Claims Court or a writ of *fieri facias* if from Federal Court, the Supreme Court of Canada or under the Criminal Code. Regardless of the name of the process, the duties and rights of the sheriff are constant. The sheriff may also be called upon to perform the same duties when the judgment consists of a certificate obtainable under various Acts and deemed to be enforceable as a judgment.[20]

C. Property Subject to a Writ

Since the question of what property can be seized under a writ of seizure and sale has already been considered in depth,[21] only a general summary will be undertaken here.

The primary enactment in British Columbia is the *Court Order Enforcement Act* which contemplates three mutually exclusive classes of personal property subject to seizure and sale. Section 49 speaks in the broadest possible terms of all goods, chattels and effects being liable to a writ of seizure and sale, but has been held to render exigible no broader range of property than could be seized at common law, namely, choses-in-possession.[22] Section 52 adds various choses-in-action consisting of money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money and section 58 authorizes execution against shares.

Debts do not fall within the scope of a writ of seizure and sale in British Columbia and ordinarily, therefore, are not the concern of the sheriff.[23]

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[16] *Small Claim Act*, R.S.B.C. 1979, c. 387, s. 58 provides that he is to be "given preference" but such preference is not to be "allowed to interfere with the speedy service or execution of process." *See* Chapter VIII, A, 1 (a) (iii).

[17] Section 2 (2).

[18] Section 6.

[19] *Williams* v. *Richards*, [1923] 1 W.W.R. 1021 (B.C.S.C. Chamb.). Section 1 of the *Creditor Assistance Act*, R.S.B.C. 1979, c. 80 reflects this rule by defining the sheriff as including the coroner as does s. 99 (3) of the *Supreme Court Act*, R.S.C. 1970, c. s. 19.

[20] *See* Appendix B. The *Creditor Assistance Act* also provides for the obtention of certificates which are valid for three years (section 13), which entitle the certificate holder to share in the distribution by the sheriff (section 3), authorize the sheriff to make further seizures (section 12) and which entitle the certificate holder to issue writs of execution (section 18). Foreign judgments registered under Part 2 of the *Court Order Enforcement Act*, R.S.B.C., 1979, c. 75 are also enforceable as if they were local judgments (section 35).

[21] C.R.B. Dunlop, "Execution Against Personal Property in England and British Columbia" (1972) 7 U.B.C.L.Rev. 171.

[22] *Ibid*. A recent decision to the contrary is *Vancouver A. & W. Drive-Ins Ltd.* v. *United Food Services Ltd. and Komarnisky*, (1981) 13 B.C.L.R. 89 (B.C.S.C. Chambers) where Fulton, J. gave the phrase "goods, chattels and effects" its broad meeting.

[23] The exception is section 34 (1) of the *Creditor Assistance Act* which authorizes the sheriff to make use of the garnishment process. *See* discussion accompanying note 254 *infra*.

A study undertaken in 1974 disclosed that there was a discrepancy between the theory of exigibility and the practice, and that the practice varied among the counties.[24] For example, particular types of personal property require variations in the ordinary procedure of seizure and sale and this engenders reluctance on the part of the sheriff to execute against that class of assets. Furthermore, it appeared that there was often a lack of familiarity with the law concerning exigibility.

Clearly there is a need for either instruction or for access to advice on the question of the general exigibility of particular assets. However, even if a complete list could be compiled and circulated to the sheriff, all problems would not be solved. He would still have to determine in each case whether a debtor owns or has an interest worth seizing in any particular asset. Whether an asset has become a fixture or not, for example, can arise if one of the assets of the debtor is a mobile home[25] and its status will determine the availability of the writ of seizure and sale. These are constant problems which may involve difficult questions of law and they cannot be solved in advance for the sheriff. Nevertheless, ready access to advice would be useful.[26]

D. Issuance and Life of the Writ

Until the writ is actually delivered for execution to the sheriff, he has no responsibilities. Whether to use a writ of seizure and sale and when to issue it are questions entirely for the execution creditor. He may cause a writ to issue anytime during the life of the order to be enforced[27] which, in the case of an order for the payment of money, is ten years in British Columbia.[28]

At common law the life of a writ was unlimited but the sheriff was commanded to make a return on a day certain and could not levy after that day.[29] By the *Common Law Procedure Act* of 1852,[30] the writ was limited to a life of one year. It could be renewed, however, or another writ known as an *alias* writ could be issued. Subsequent writs were known as *pluries* writs.

In British Columbia the Rules of Court provide that both a writ of seizure and sale from Supreme or County Courts and a warrant of execution from the Small Claim Division of the Provincial Court have a life of one year,[31] but a writ may be renewed renewed anytime before expiration.[32] A writ of *fieri facias* from the Supreme Court of Canada also is valid for one year only,[33] but a writ of *fieri facias* from Federal Court has a five year life.[34] Both are renewable.

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[24] G. Crawford, Empirical Study, 1974, unpublished paper prepared for the Law Reform Commission of British Columbia.

[25] *See, e.g., Re Plett*, (1981) 15 Man. R. (2d) 208 (Man. Q.B.).

[26] *See* the suggestion set out in Chapter III, F, 1. With respect to the question of ownership the sheriff can utilize the interpleader process in the Supreme Court Rules. *See* discussion accompanying note 353 ff. *infra*.

[27] B.C.S.C. Rules, R. 42 (14).

[28] *Limitation Act*, R.S.B.C. 1979, c. 236, s. 3 (2). At common law the time within which *fieri facias* could issue without revival of the judgment was a year and a day: H.M. Herman, Treatise on the Law of Executions, (1875) at 58; C.R.B. Dunlop, *Creditor-Debtor Law in Canada*.

[29] *Simpson* v. *Heath*, (1839) 5 M. & W. 631, 151 E.R. 267; *Snowball* v. *Dixon*, (1841) 4 Y. & C. Ex. 511, 160 E.R. 1109.

[30] 15 & 16 Vict. c. 76, ss. 124, 125.

[31] *Rules of Court*, R. 42 (15), "A writ of execution, if unexecuted, shall remain in force for one year only unless renewed."; made applicable to Small Claim Court by *Small Claim Act*, R.S.B.C. 1979, c. 387, s. 4. It is somewhat anomalous that a certificate under the *Creditor Assistance Act*, R.S.B.C. 1979, c. 80 is valid for three years, s. 13.

[32] Rule 42 (15) (b), Rule 3 (2) and (3) provide for extensions of time but whether that Rule is applicable to renewals of writs of execution is uncertain. There are two Saskatchewan decisions which hold, in the context of similar rules, that Saskatchewan courts have no such power but that, if they do have such power, it is discretionary and will not be exercised for the benefit of a judgment creditor who has simply failed to renew. The Court in the later case does state, however, that it has inherent power to make a *nunc pro tunc* order if the attempt to renew has been frustrated by a court officer; *Labrosse* v. *Choquette*, [1917] 1 W.W.R. 491 (Sask. S.C. Chamb.); *Johnston* v. *Dimond*, [1934] 3 W.W.R. 340 (Sask. Q.B.).

In Ontario, in *Re Solicitor*, [1959] O.W.N. 8 (H.C.J.) where the original writ had been issued and then held undelivered by the solicitor for three years, an application was made for the issuance of a new writ and the Master held that though there was a right to a new writ, the proper practice was to apply for an *alias* writ with material showing that the old writ was no longer in force and that the judgment remained unsatisfied.

[33] Rule 122.

The intent of these various provisions is to set a maximum life for a particular process: the earlier of one year or the date on which the writ is executed in the sense that it is fully satisfied. The practice which was found to exist in some counties in British Columbia in 1974 of the sheriff retaining the writ past the year without renewal if a partial levy had been made would appear to be totally unjustified.[35] Any levies made after the year would be made without the authority of a valid writ and would render the sheriff liable to action at the instance of the judgment debtor.[36] On the other hand, it is quite clear that the sheriff can levy as often as necessary in the course of the year on the same writ in order to obtain the necessary amount.[37]

The question which arises from the provisions setting a fixed period of validity for the writ is whether the sheriff is under any duty to notify the execution creditor that the writ is about to expire. In a recent British Columbia Supreme Court case, *Rempel* v. *Parks*,[38] Meredith, J. held a sheriff's officer liable for negligence in failing to communicate with a solicitor or return a writ of summons to him before its expiry. Liability for negligence of the same sort in respect to a writ of execution would seem to be a logical possibility if the judgment creditor could establish that he had suffered damage as a result.[39] Before the enactment of the *Creditor Assistance Act*, which attempts to abolish priority among creditors,[40] the damage suffered would have been loss of priority. Now it is likely that the damage suffered would be that the judgment debtor could freely dispose of his property as it would no longer be subject to the binding effect of the writ.[41]

The only obligation to report is a direction to make a return to the court after the writ has been executed. Thus, the duty to return does not cover the situation where there has been no levy, or only a partial levy within the year. The sheriff, therefore, must pay attention to the date when the writ was issued on pain of putting himself at risk at the instance of the debtor and possibly also the creditor.

E. Execution of the Writ

It is relatively easy to state the duties of the sheriff in executing writs of seizure and sale and to point to the problems he faces in fulfilling those duties. It is far more difficult to state whether in any given case he has complied with the duties imposed by the law and to recommend solutions for the difficulties he faces and which sheriffs have faced generally for at least a couple of centuries.

1. ORDER OF EXECUTION

The common law duty of the sheriff is to execute writs against a particular judgment debtor in the order in which they are delivered to him for execution.[42] If he levies under a later delivered writ, the sheriff must still satisfy the execution creditor who delivered the first writ.[43] Delivery of a writ with instructions not to seize or not to seize until the happening of a certain event is not delivery of a writ for execution, however, and that execution creditor has no priority.[44]

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[34] Rule 2006 (1).

[35] Crawford, Empirical Study *supra*, note 24 at 34.

[36] See text accompanying note 342 ff. *infra*.

[37] *R.* v. *Sheriff of Essex*, (1839) 8 Scott 363, 6 Bing. N.C. 150, 133 E.R. 59.

[38] (1982) 34 B.C.L.R. 253 (B.C.S.C.).

[39] The express imposition of this duty was suggested in (1877) 13 Can. L.J. 262.

[40] The word 'attempts' is used advisedly: *see* the Law Reform Commission Report, *supra*, note 13.

[41] For discussion of the binding effect of a writ see G.V. Forest, "Some Aspects of the Writ of Fieri Facias" (1959) 12 U.N.B.L.J. 229; C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (1981) at 378-79; and text accompanying note 128 ff. *infra*.

[42] *Ashworth* v. *The Earl of Uxbridge*, (1842) 12 L.J.Q.B. 39; *Kempland* v. *Macauley*, (1820) 1 Peake 95, 170 E.R. 91.

This common law rule was given statutory expression in British Columbia in the *County Courts Act*.[45] While that provision was repealed in 1976[46] and though there never was an equivalent provision for writs from the Supreme Court, there is no reason to doubt that the common law rule prevailed for the Supreme Court then and now, as well as for process issuing from the County Court to and from any other court.

The *Creditor Assistance Act* may render the common law rule less important for a judgment creditor, but since that Act applies only to creditors from Supreme and County Courts,[47] it does retain significance for process from the Small Claim Division and it is arguable that it also retains significance for process issuing based on judgments from Federal Court and the Supreme Court of Canada. These courts defer to provincial laws with respect to the mode of sale,[48] but that phrase does not necessarily include payment out to the execution creditor.[49]

2. THE SEARCH FOR PROPERTY

At common law the sheriff was bound to know not only the person of every inhabitant within his bailiwick, but also all his goods and chattels.[50] The early cases give one the impression that this knowledge indeed existed, not only on the part of the sheriff but also on the part of the judgment creditor.

Such knowledge is now an impossibility since the bailiwick of the sheriff is now in law the entire province,[51] yet the duty on the sheriff to search for and seize the exigible property of the judgment debtor entirely on his own remains the same. There is still no obligation on the execution creditor or his solicitor to do any more than fill in the blanks on the form even though they now are the persons who undoubtedly have the most information about the debtor,[52] meagre though that may be, or who at least are in the best position through examination to acquire information.[53] Unless the exigible property consists of shares, (which the sheriff need not seize unless expressly instructed to do so by the execution creditor[54]) the sheriff legally, and usually in practice, is entirely on his own.[55]

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[43] *Hunt* v. *Hooper*, (1844) 12 M. & W. 664, 152 E.R. 1365.

[44] *Bryant* v. *Carroll*, (1839) 3 J.D. 386; *Doker* v. *Hasler*, (1825) 2 Bing. 479, 130 E.R. 391; *Hazley* v. *McArthur*, (1897) 11 Man. R. 602 (Man. Q.B.); *Hunt* v. *Hooper*, *supra*, note 43; *Pringle* v. *Isaac*, (1822) 11 Price 445, 147 E.R. 527. Whether such instructions have been given is a question of fact: *Bryant* v. *Carroll*.

[45] R.S.B.C. 1960, c. 81, s. 140.

[46] *Miscellaneous Statutes (Court Rules) Amendment Act, 1976*, S.B.C. 1976, c. 33, s. 66.

[47] *Creditor Assistance Act*, R.S.B.C. 1979, c. 80, s. 47

[48] Federal Court Rules, R. 2108; Supreme Court of Canada Rules, R. 114.

[49] The *Creditor Assistance Act* relieves the sheriff of the necessity to determine priority of payment and precludes the occurence of the problem faced by the sheriff in *Ashworth* v. *The Earl of Uxbridge*, *supra*, note 42. In that case five writs were delivered simultaneously one day and then seven more simultaneously the next. There were enough goods to satisfy in full the first five writs but not the subsequent seven. The sheriff asked for directions from the attorney concerning order of payment. The attorney declined to assist. The sheriff, under a duty to make a return to the writs which would, of course, necessitate determination of priorities, applied to the court. All participants appear to have been completely baffled. The common law required that priority be determined by date of delivery. Rateable payment was not permitted. Wightman, J. finally suggested that the sheriff make a return to each writ that he had seized under several writs and could not determine priority. That at least would be true, though the learned judge was not sure it would constitute a good return.

For discussion of the amenability of Federal Court writs to the *Creditor Assistance Act*, *see* text accompanying note 252, ff. *infra*.

[50] G. Atkinson, *Sheriff Law* (1854) at 171.

[51] *Sheriff Act*, R.S.B.C. 1979, c. 386, s. 4. Some solicitors actually expect the local sheriff to act on a province-wide basis. Economy and efficiency require, however, that the sheriff from the Vancouver district not spend time and money travelling to Fort St. John, for example, to execute a writ. If the solicitor cannot be persuaded to do so himself, the sheriffs' office will forward the writ to the appropriate district.

A related problem is that solicitors from outside the province often send a writ issued from their own court system directly to the British Columbia sheriff, apparently in ignorance of the fact that their foreign judgment must be converted to a local judgment before it is enforceable in this province. The sheriff returns the writ. It is not clear whether British Columbia solicitors follow the same mistaken practice.

[52] *Dyke* v. *Duke*, (1838) 4 Bing. N.C. 197, 132 E.R. 764; *Hutchings* v. *Rutton*, (1857) 6 U.C.C.P. 452; *Smith* v. *Keal*, (1882) 9 Q.B.D. 340 (C.A.).

[53] B.C. Supreme Court Rules, R. 42 (27)-(49), Rule 42A.

One factor which acts as a deterrent to greater help from the execution creditor is, of course, the expense of obtaining information. Another is the possibility of incurring liability for any irregularity on the part of the sheriff if the information given is perceived to constitute a direction to the sheriff to seize a particular asset so as to make the sheriff the agent of the judgment creditor.[56] It is a question of fact to be decided in the circumstances of each case whether a direction has been given and in at least one English case, the court has leaned in favour of absolving the judgment creditor in order to ensure a continued flow of information to the sheriff.[57]

The sheriff must exercise due diligence in searching for assets, and whether he has is a question of fact.[58] Failure to exercise due diligence is actionable at the instance of the execution creditor. The difficulty is in determining whether the standard has been met in any particular case, there being many degrees of vigilance between keeping a constant vigil for days or weeks in succession and paying merely a couple of visits.

If there is no prior knowledge of what property the debtor possesses, then the search entails entry problems such as occurred in *Munk* v. *Cass*.[59] In that case the debtor barricaded himself in his house until the date on which the sheriff had to make a return. The court was mildly sympathetic to the quandary in which the sheriff found himself in not knowing what return to make but said he simply had to do better:[60]

> No instance has been shewn to me in which it has been held that the sheriff can make such a return as this. No doubt he is in a situation of difficulty. That, however, is not a case of novelty, as the sheriff is often placed in positions of difficulty, out of which he must get as well as he can. The case has been argued on the part of the sheriff as if an interference had taken place with his exertions on the part of the Queen's enemies. He must either return that there are no goods to take, or he must take them . . . .

Williams J. did, however, allow the sheriff a week's extension to amend his return. While the sheriff is not now under a duty to make a return until the writ is executed, the problem remains that he cannot seize what he cannot find and he cannot find anything if he cannot effect entry.

Another major problem encountered by the sheriff in the search is deciding whether goods in the possession of the judgment debtor are actually the property of some third party and whether goods in possession of a third party actually belong to the judgment debtor. Resolution of this problem may involve questions of law or fact or mixed law and fact. Until 1831, the sheriff decided such questions entirely on his own and at his peril, for the wrong conclusion could subject him to action at the instance either of the judgment creditor for failing to seize or at the instance of the third party for trespass. There are now two possible means of solving such ownership problems:

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[54] *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 59 (1). *Quaere* whether he may seize without instructions?

[55] Crawford, Empirical Study, *supra*, note 24 at 15 - 16 states that approximately 80% of the writs received had little or no background information of aid to the sheriff and that of those writs which did provide information a "relatively large percentage of the information was so inaccurate or carelessly obtained as to be useless."

[56] *Graves* v. *Sprague*, (1920) 48 N.B.R. 36 (C.A.); *Humphrys* v. *Pratt*, (1831) 5 Bligh N.S. 154, 5 E.R. 269; *Lee* v. *Romilly*, (1890-91) 7 T.L.R. 303 (C.A.); *Morris* v. *Salberg*, (1889) 22 Q.B.D. 614 (C.A.); *Smith* v. *Keal*, (1882) 9 Q.B.D. 340 (C.A.).

[57] *Childers* v. *Wooler*, (1860) 2 El. & El. 287, 121 E.R. 109.

[58] *Finnigan* v. *Jarvis*, (1850) 8 U.C.Q.B. 210.

[59] (1841) 9 Dowl. 332. *See also Finnigan* v. *Jarvis*, *supra*, note 58.

[60] *Ibid.* at 333.

interpleader[61] and searches of appropriate registries where relevant. Since the sheriff has the duty of searching and seizing and the common law puts no responsibility on the execution creditor, it is obviously the duty of the sheriff to make such searches in British Columbia.

In conducting a search for assets, a sheriff in British Columbia and any judgment creditor or anyone on his behalf, must, of course, take account of the restraints imposed by the *Debt Collection Act*.[62] Section 14 of that Act provides that:

> (1) No person shall, in collecting, negotiating or demanding payment of a debt, or in repossessing, seizing or distraining on any chattel, or in evicting a person from property, exert undue, excessive or unreasonable pressure on a debtor, or a member of his family or household, or his employer . . . .

Then, "without limiting the generality of the foregoing" the Act provides for ten particular situations in which such impermissible pressure shall be deemed to have been exerted of which one at least, subparagraph (c), could be relevant to the search for assets. That subparagraph deems it to be unreasonable pressure if a person:

> (c) communicates with a debtor, his family or his employer in a manner and in circumstances that, because of the nature or frequency of the communications, alarm, distress and humiliation are likely to result;

While it is unlikely that that section was intended to control sheriffs executing writs of seizure and sale, it is also quite foreseeable that inquiries by the sheriff of the judgment debtor and/or his family as to what assets he has that can be seized and sold are highly likely to cause alarm, distress and humiliation in fact.[63]

The Charter of Rights and Freedoms also guarantees that "Everyone has the right to be secure against unreasonable search or seizure."[64] While it is very doubtful that the search for and seizure of assets by the sheriff could be said to be an infringement of that right, it is totally predictable that the Charter will be invoked in every possible situation for the next few years and there is a possibility, therefore, that the procedures for executing a writ may be measured against the Charter some day.

Not only is the search a problem of considerable antiquity, it is also still a major problem common to all jurisdictions employing the sheriff system. If it could be solved, then the efficiency of the execution process would be considerably improved. In the absence of any modifications to the present law, the most that can be said is that it is in the interest of the judgment creditor to provide the sheriff with the maximum amount of information about the debtor, ensuring that the communication to the sheriff is cast in the form of information rather than of a direction and leaving to the sheriff the discretion whether or not to act on that information.

Various legislative changes have been suggested for obtaining information and are worth considering for British Columbia. The Ontario Law Reform Commission has endorsed the introduction of a questionnaire, not as a replacement for but as a precondition to oral examination, with the hope that the oral examination might be rendered unnecessary.[65] The Payne Report also favoured this mode of obtaining information.[66]

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[61] *See* text accompanying note 353 ff., *infra*.

[62] R.S.B.C. 1979, c. 88.

[63] *See* Law Reform Commission of British Columbia *Report on Debt Collection and Collection Agents* (LRC 4, 1971) for a general discussion of the problems intended to be eliminated.

[64] Section 8, Part 1, *Constitution Act*, 1982.

[65] Ontario Law Reform Commission, *Report on The Enforcement of Judgment Debts and Related Matters* 1981, Part 1 at 155-69.

[66] *Report of the Committee on the Enforcement of Judgments* 1969 (Cmnd. 3909) at 121.

An alternative or supplementary mode of acquiring information that has been suggested is for the sheriff to be responsible for the conduct of the oral examination.[67]

A complete change would be to cast the burden either entirely or in part on the execution creditor.[68] In Ontario, for example, the responsibility for conducting public registry searches already rests entirely on the execution creditor.[69]

Greater success could probably be obtained, however, simply from an increase in the manpower of the sheriff's office which would reduce the individual burden. The duties would remain as described above but each officer would have more time to deal with each case.

3. SEIZURE

Having identified property which he believes is owned by the judgment debtor or in which he believes the judgment debtor has a beneficial interest, the next duty of the sheriff is to seize enough of the goods to satisfy the amount endorsed on the writ and to keep those goods seized safely until they can be sold or until he is paid by the judgment debtor. Either method of obtaining money constitutes a levy by the sheriff.

(a) Time

Form 42 commands the sheriff to seize and sell "forthwith." Judicial interpretations of that term in a variety of contexts reveal that it does not possess any absolute meaning but it may vary from "immediately" to "within a reasonable time."[70] In the context of execution, it means that the sheriff must act with due diligence or within a reasonable time in the circumstances.[71] As he is obliged to remain indifferent as between the parties, he "should not consider whether a delay will be advantageous to one party or not. He ought not to exercise his judgement upon it; it is his duty to obey the orders of the Court, to seize and sell the goods immediately . . . ."[72] The difficulty for the modern sheriff here is that what was reasonable diligence in the nineteenth century cases is probably now virtually impossible. For example, it is not unusual to find the sheriff in the early nineteenth century seizing on the same day or the day following delivery of the writ.[73] In *Hobson* v. *Thelluson*,[74] an action was brought against the sheriff by the judgment creditor for not levying, and for making a false return. The writ of *fieri facias* had been delivered to the deputy sheriff in London on the 23rd May[75] and had been sent to Huddersfield, arriving on the morning of the 24th. At 10:00 a.m. on the morning of the 24th, the judgment debtor had executed a deed of assignment of all his goods for the benefit of his creditors, thereby dispossessing himself of any goods which the sheriff might have seized for the sole benefit of the plaintiff/creditor. After due consideration, the court decided that the failure to seize between 9:00 a.m. and 10:00 a.m. was not a breach of the duty of due diligence.[76]

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[67] Ontario Report, Part I, *supra*, note 65 at 162-63.

[68] *Sheriff's Act* S. Nfld. 1975-76, No. 73, s. 16 (3).

> Every instruction upon a writ of execution directed to the Sheriff or Sub-sheriff, as permitted by this section, shall clearly identify by description or definition the property on which a levy and execution is required to be made and the Sheriff or Sub-sheriff is empowered to require reasonable proof of ownership or interest in the property on which a levy and execution is required to be made.

No protection appears to be provided for the execution creditors, however, against the liability that such directions might incur at common law.

[69] Ontario Report, Part I, *supra*, note 65 at 168-69.

[70] *Cottar* v. *Hetherington*, (1859) 1 El. & El. 802, 120 E.R. 1111; *Ex parte Lamb*, (1881-82) 19 Ch.D. 169 (C.A.).

[71] *Brown* v. *Jarvis*, (1836) 1 M. & W. 704, 150 E.R. 617; *Robinson* v. *Grange*, (1859) 18 U.C.Q.B. 260. Atkinson *supra*, note 1 at 181 uses the phrase "a convenient time after delivery."

[72] *Woodgate* v. *Knatchbull*, (1787) 2 T.R. 148, 100 E.R. 80 at 85.

[73] *E.g.*, *Bowen* v. *Bramidge*, (1833) 6 C. & P. 140, 172 E.R. 1180. *Gladstone* v. *Padwick*, (1871) L.R. 6, Exch. 203. On the other hand, it is also possible to find cases in which the sheriff held the writ for two or three years: *In Re Moffatt*, (1867) 27 U.C. Q.B. 52; *Hazley* v. *McArthur*, (1897) 11 Man. R. 602 (Q.B.).

[74] (1866-67) L.R. 2 Q.B. 642.

[75] By s. 24 of the 1887 *Sheriff's Act* 50 & 51 Vict. c. 55, it was mandatory for the sheriff to appoint a deputy sheriff with an office within one mile from the Inner Temple for the sole purpose of accepting delivery of process to the sheriff.

The most that can be said as to the present duty of the sheriff to seize forthwith is that due diligence is a question of fact[77] and that the proper approach if complaint is made on this score is that taken in *Robinson* v. *Grange*,[78] namely, to consider the time taken in the circumstances of the case: the time when the writ was delivered, the information received about the property, any instructions or absence of instructions as to urgency, and what other duties the sheriff was under an obligation to fulfill:[79]

> Was the sheriff, then, or his deputy or clerk, bound to give up all attention to other, perhaps equally pressing, duties of his office in order to attend to the seizure upon that *fi.fa.*? A reasonable time must be allowed in all such cases . . . .

A judgment creditor may have special grounds for complaint if property which might have been seized by the sheriff is lost or destroyed while the sheriff delayed.

Though the sheriff is absolutely prohibited from seizing on a Sunday and may be liable to the judgment debtor if he does,[80] the common law permits him to seize at any hour of the night or day. Indeed, in 1893 in *The Attorney General* v. *Kissane*,[81] the evidence showed that in the County of Kerry, 95 per cent of the writs of *fieri facias* executed since 1886 had been executed before sunrise and, in the opinion of the undersheriff of the County, such hours of execution were an absolute necessity in order to get the job done.[82]

British Columbia has made no statutory inroads on this common law rule although it was once clearly the intention of the Legislature to do so. Section 14 (1) (j) of the *Debt Collection Act* contemplates days and hours of days on and within which communication for the purpose of collection of a debt will not be permitted and section 15 (c) prohibits seizure during those same days and hours. Those days and hours were to be set by regulation but no such regulations have to date been passed.

Thus the present state of the law in British Columbia entitles the sheriff to seize at any hour of the day or night. Further, it obligates him to do so if necessary in order to fulfill his obligation to seize within a reasonable time after delivery of the writ.

(b) Entry

All cases concerning the right of a sheriff to enter the home or dwelling of an individual in the execution of writs refer to *Semayne's Case*[83] and the distinction drawn there by the Court of King's Bench. Though "the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose" still, when executing process at the instance of the Crown, the sheriff may break and enter if his request to enter is denied.[84] In executing process against the body or goods of a person at the instance of a private individual, however, the sheriff is prohibited from breaking and entering. An exception to this prohibition arises when the debtor secretes himself or his goods in the house of a stranger in order to frustrate the execution process. The sheriff may, in this case, break and enter the stranger's house, after requesting entry, provided that the debtor or his goods are in fact to be found within. Indeed, even entering the house of a stranger through an open door, will be trespass if the prey is not found.[85]

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[76] Because the goods were bound by the delivery of the writ to the deputy sheriff in London, the sheriff could still have seized them after 10 a.m. but there was no liability for failure to seize because no damage was suffered, the assignment constituting an act of bankruptcy denying the execution creditor the full benefit. *See* discussion accompanying note 140 ff. *infra*, concerning the obligation of the sheriff to seize goods in the hands of third parties.

[77] *Darling* v. *Corbett*, (1851) 8 U.C Q.B. 72.

[78] *Supra*, note 71.

[79] *Ibid.* at 280.

[80] *Supreme Court Act*, R.S.B.C. 1979 c. 397, s. 64.

[81] (1893) 32 L.R. Ir. 220 (Q.B.D.)

[82] *See also Brown* v. *Glenn*, (1851) 20 L.J.Q.B. 205; *Nixon* v. *Freeman*, (1860) 5 H. & N. 652, 157 E.R. 1341. Both are cases of distraint and in both a distinction is drawn between the limitations on hours when a sheriff may distrain and the absence of any limitations on seizure under *fieri facias*.

[83] (1604) 5 Co. Rep. 91 (a), 77 E.R. 194. *See generally*, W.F. Foster and J.E. Magnet, "The Law of Forcible Entry" (1977) 15 Alta. L.R. 271 at 274-76.

Sometimes it is difficult for the sheriff to determine whether the dwelling in question is that of the debtor or that of a stranger. Ownership by another does not necessarily answer the question. The key appears to be residence or likelihood of residence by the judgment debtor. Thus in *Cooke* v. *Birt*,[86] for example, the plaintiff failed in a trespass action against the sheriff because the court decided that his house had been converted from that of a stranger into the dwelling of the judgment debtor when he had married the widow-administratrix of the judgment debtor. His house was now the one where the goods would "naturally" be found.

Nearly five centuries of litigation have followed *Semayne's Case* and though it may now be possible to state a number of propositions of law concerning the sheriff's rights of entry, uncertainty will naturally always persist concerning their application in particular situations.[87]

First, it is clear that the prohibition on breaking and entering applies only to outer doors. Once inside the home, the sheriff may break inner doors, cupboards, boxes, trunks, etc.[88] Whether he must make a request before each breaking was once a matter of dispute, but a consensus appears to have been reached that there is no obligation to do so.[89] The rationale for distinguishing between inner and outer doors was based on safety and security for the family of the debtor: the privilege was that of the house and family, not that of the debtor. Outer doors must not be broken because then any robber could get in.[90] Debtors living in lodgings, therefore, are virtually unprotected from execution against their goods if entry to the house is permitted. The doors to their rooms are considered inner doors.[91] Inns of court and colleges were considered, on the other hand, to have many outer doors. Presumably, dwellers in apartment buildings would fall in the latter protected category if the main doors to the building open freely.[92] When each apartment dweller controls the opening of the main door through an intercom system, however, the status of their individual apartment entrance doors becomes somewhat less clear. Houses under construction or reconstruction may also engender difficult decisions for sheriffs as *Whalley* v. *Williamson*[93] illustrates. There the sheriff entered on a writ of *ca.sa.* through an open hole in an unfinished house. He then tore down some boards covering the door to the staircase. The legality of the entrance depended entirely on evidence as to whether the outer door was to be located at the hole in the wall at which initial entry had been gained or at the place where the boards had to be removed. Unfortunately for the sheriff, the court accepted that the boarded up place was to be the location of the outer door so he had broken without any right and was liable for damages for trespass. A sheriff, evidently, must also be an expert in house construction and design.

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[84] *Eccles* v. *Bourque*, (1979) 19 C.C.C. (2d) 129 at 131 (S.C.C.).

[85] *Biscop* v. *White*, (1600) Cro. Eliz. 759, 78 E.R. 991; *Johnson* v. *Leigh*, (1815) 6 Taunt. 246, 128 E.R. 1029; *Morrish* v. *Murrey*, (1844) M. & W. 52, 153 E.R. 22; *Park* v. *Percival*, (1724) Hob. 63, 80 E.R. 211; *Southam* v. *Smout*, [1964] 1 Q.B.D. 308 (C.A.).

[86] (1814) 5 Taunt. 765, 128 E.R. 893; *Purcell* v. *Mulcahy*, [1936] A.L.R. (Vic.) 128, noted (1936) 10 Aust. L.J. 26.

[87] *See, e.g.*, Smith's Leading Cases vol. I (13th ed. 1929) at 110-19; Atkinson, *supra*, note 1 at 181-82.

[88] *R.* v. *Bird*, (1679) 2 Show. 87, 89 E.R. 811; *Kerbey* v. *Denby*, (1836) 1 M. & W. 336, 150 E.R. 463; *Lloyd* v. *Sandilands*, (1818) 8 Taunt. 250, 129 E.R. 379.

[89] *Ratcliffe* v. *Burton*, (1802) 3 Bos. & Pul. 223, 127 E.R. 123 suggests that a demand be first made but *Hutchison* v. *Birch*, (1812) 4 Taunt. 619, 128 E.R. 473 decided that a demand was not strictly necessary.

[90] *Lee* v. *Gansel*, 1 Cowp. 1, 98 E.R. 935.

[91] *Ibid*. *Lloyd* v. *Sandilands*, *supra*, note 88.

[92] *Welsh* v. *Kracovsky*, [1919] 3 W.W.R. 361 (B.C.C.A.)

[93] (1836) 7 Car. & P. 294, 173 E.R. 130.

Second, it is only the outer door of the dwelling house or of buildings within the curtilage[94] that are protected from breaking. Thus a building used exclusively as a workshop or a warehouse and all commercial premises generally, may be broken by the sheriff, if locked, in order to seize goods.[95] A garage may be protected, however, as a building within the curtilage. The characterization of dual or multipurpose buildings or buildings within the curtilage as protected homes probably depends on their construction and organization with respect to internal communications. The fact that one purpose is the housing of the debtor will not be conclusive as to its characterization as a dwelling house. Even if a part of the building is lived in, a breaking of the non-residential part should not be regarded as misconduct on the part of the sheriff if there is no access between the two parts.[96]

Third, it is not every uninvited entrance that amounts to a breaking. In 1964 in *Southam* v. *Smout*,[97] the English Court of Appeal considered that the law respecting what constituted a breaking was still unsettled, and accordingly reduced to L2 from L10 the fine imposed on a householder who had forcibly resisted bailiffs attempting to arrest his mother-in-law, while she was in his house engaged in feeding her grandchildren. The Court of Appeal found that the entry by the bailiff when the front door opened at his knock was not breaking but, as Lord Denning pointed out, Mr. Smout, the homeowner, could hardly be expected to have known as he might have been relying on Comyn's Digest as authority for his resistance.[98]

The law in England as now settled is that a sheriff, or persons employed by him in the execution of a writ of *fieri facias*, may not use force to open closed doors but may open such doors by lifting the latch or turning the handle. The theory is that by leaving the door unlocked, there is an implied permission to all to enter. That implied permission to enter can be expressly revoked by the judgment debtor, however, as the bailiffs discovered to their pain in a case following closely on *Southam* v. *Smout*. In *Vaughan* v. *McKenzie*,[99] the debtor returned home with her child to find bailiffs waiting for her in the street, requesting permission to enter and seize. She refused but had to open her door to gain entry herself. One bailiff managed to interpose his foot and with the aid of the second bailiff forced open the door only to find that Mrs. MacKenzie was emphasizing her denial of entry with the aid of a handy (full) milk bottle. The court considered the bailiffs to have committed a breaking. Lord Parker, C.J. stated:[100]

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[94] Black's Law Dictionary (4th ed., 1968) defines curtilage as follows:

> The enclosed space of ground and buildings immediately surrounding a dwelling-house.
> In its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon which is usually enclosed within the *general fence* immediately surrounding a principal messuage and outbuildings, and yard closely adjoining to a dwelling house, but it may be large enough for cattle to be levant and couchant therein.
> The curtilage of a dwelling-house is a space necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by fence. [References omitted.]

[95] *Penton* v. *Browne*, (1714) 1 Sid. 186, 82 E.R. 1047; *Hobson* v. *Thelluson*, (1866-67) L.R. 2 Q.B. 642; *Hodder* v. *Williams*, [1895] 2 Q.B. 663 (C.A.).

[96] *R.* v. *Higgs*, (1846) 2 Car. & K. 322, 175 E.R. 133 *contra Hudson* v. *Fletcher*, (1909) 12 W.L.R. 15 (Sask. Q.B.) where the court reluctantly felt bound to disregard this proposition because all parts of the building were under the same roof.

In deciding whether the building is protected it is common to use criminal cases. Section 306 of the Criminal Code maintains the distinction between dwelling houses and other buildings. The distinction has now been abandoned in England: *Theft Act*, 1968 c. 60, s. 9.

[97] *Supra*, note 85.

[98] The 5th edition was printed in 1822.

[99] [1969] 1 Q.B. 557 (C.A.)

> I confess I find it difficult to see what the real difference was here between a door which is momentarily opened but sought to be closed and can only be fully opened by violence, and a door which is shut and can only be opened by violence.

and Winn, L.J. stated more generally:[101]

> It seems to me that the essential criterion in such a situation is whether the householder has left a means of entrance available for me without the employment of any degree of force.

If the present English law regarding entry is applicable in British Columbia, the sheriff is entitled to use force if necessary to open the doors of any non-residential building and may open any closed outer doors of a residence provided only he need employ no force and the householder has not expressly denied entrance.

If, however, a British Columbia court were to follow a line of reasoning adopted recently in the Ontario Court of Appeal, the right of a sheriff to enter a home may be severely restricted. In *R*. v. *Landry*,[102] the charge was assaulting a peace officer in the execution of his duty contrary to section 246 (2) of the *Code*. The officers had entered the accused's apartment through an open door but they were without a warrant. Though clearly distinguishing between the right to enter of a sheriff and that of a private citizen, which the constables were in the absence of a warrant, Houlden, J.A. with Thorson, J.A. concurring, considered the problem as one of permission to enter or not, the very basis for the entry of a sheriff. Leaving a door open on a warm summer night was not a licence to enter and the fact that no objection was taken before entry cannot be construed as acquiescence or permission to enter.

The sheriff executing judicial process may have greater rights of entry than a peace officer without a warrant but the reasoning of the Ontario Court of Appeal points up the weakness of resting his rights of entry on an implied permission to enter. It does not appear to touch, however, on the common law right of the sheriff to re-enter forcibly after a forcible ejection, the first entry having been through an open door[103] because that re-entry does not rest on any basis of implied permission. The re-entry is said to be justified because a man cannot take advantage of his own wrong, the wrong being the forcible ejection.

Doors, of course, are not the only openings in the outer wall of a home. Windows are also a means of ingress. Here the position at common law is quite clear, though somewhat inconsistent with the law reproduced above respecting doors. An open window may be legally used to enter and for this purpose may be opened further. If, however, it is closed, even if unlatched, it may not be opened.[104]

Should the sheriff become locked into a house, having entered legally, as mysteriously happened in *Pugh* v. *Griffith*,[105] and no one arrives to let him out, he may break doors in order to exit with the seized goods.

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[100] *Ibid*. at 562.

[101] *Ibid*. at 563.

[102] (1982) 128 D.L.R. (3d) 726 (Ont. C.A.). On appeal to the Supreme Court of Canada.

[103] *Aga Kurboolie Mahomed* v. *The Queen*, (1843) 4 Moore 239, 13 E.R. 293 (F.C. from India); *Eagleton* v. *Guttridge*, (1843) 11 M. & W. 465, 152 E.R. 888; *Bannister* v. *Hyde*, (1860) 2 E. & E. 627, 121 E.R. 235.

[104] *Attack* v. *Bramwell*, (1863) 3 B. & S. 520, 122 E.R. 196; *Crabtree* v. *Robinson*, (1885) 15 Q.B.D. 312; *Hancock* v. *Austin*, (1863) 14 C.B. (N.S.) 634, 143 E.R. 593; *Nash* v. *Lucas*, (1866-67) L.R. 2 Q.B. 590. The above are all distraint cases but since they define what amounts to a breaking of a window they are equally applicable to the sheriff executing a writ who is forbidden to break and enter.

[105] (1838) 7 Ad. & E. 827, 112 E.R. 681.

Even if the original entry has been legal, misconduct in the course of conducting the levy can still convert the sheriff into a trespasser *ab initio* and render him liable for damages. Such misconduct may consist of physical damage, remaining beyond a reasonable time,[106] or locking out the execution debtor.[107] Withdrawal after entry and/or seizure on the instructions of the judgment creditor requires fresh instructions to validate a second entry.[108]

Apparently the sheriff has no right to search the person of the judgment debtor in order to seize assets.[109] Thus even though the *Court Order Enforcement Act* provides that money, bank notes, cheques, etc. are exigible, if they are on the person of the debtor, they will be immune unless he voluntarily hands them over.

(c) *Mode of Seizure — Abandonment — Section 59* Court Order Enforcement Act — *Goods Chattels and Effects*

Early common law contemplated seizure as the exercise of actual physical control either by removal of the goods or by leaving a man in possession. Either mode engendered additional expenses — the costs of removal and storage or the costs of paying to keep a man in possession, — and the latter mode promised both the additional element of inconvenience for the debtor, as the bailiff "used to sit down in the kitchen and make himself at home"[110] and the possibility of an action against the sheriff if the man were left in possession too long or too riotously.[111]

If the sheriff chooses to remove the goods from the debtor's premises after seizing them, he must comply with the same general standard of due diligence as to time as was discussed earlier. No exact amount of time for removal can be gleaned from the cases but the time taken must be reasonable in the circumstances.[112] Once he has removed goods, he is under a duty to care for them.[113]

When goods are actually removed, or a man is left in possession, there can be no doubt that they have been seized. Anything less, however, raises questions as to whether a seizure has actually been effected. This question of fact involves proof of three essential elements: the intention of the sheriff to seize; communication of his intention; and his presence in the vicinity of the goods, close enough to lay hands on the goods, though he need not actually do so.[114]

The intention to seize must be communicated to someone on the premises but it need not be the debtor personally and at common law, it need not even be an adult. In *Lumsden* v. *Burnett*,[115] the bailiff informed the thirteen year old daughter of the debtor of his intention and the Court of Appeal held that to have been sufficient. For British Columbia, this common law rule has apparently suffered statutory reversal by section 15 of the *Debt Collection Act* at least for the situation in which the sheriff actually removes the goods. Though the section is headed "Practices of Bailiffs," the words of the section render them generally applicable:[116]

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[106] *Ash* v. *Dawnay*, (1852) 8 Exch. 237, 155 E.R. 1334; *Playfair* v. *Musgrove*, (1845) 14 M. & W. 239, 153 E.R. 465. It is a question of fact whether the sheriff has stayed longer than a reasonable time, but sometimes, as in *Playfair*, where the officer settled in for three months, unreasonableness is obvious.

[107] *Watson* v. *Murray and Co.*, [1955] 2 Q.B. 1.

[108] *Shaw* v. *Kirby*, (1888) 52 J.P. 182. The sheriff may withdraw (i.e. abandon seizure) and re-enter on the same writ provided the writ is still valid: *Gates* v. *Smith*, (1863) 13 U.C.C.P. 572.

[109] *Yakimishyn* v. *Bileski*, [1946] 1 W.W.R. 663 (Man. K.B.).

[110] *National Commercial Bank of Scotland* v. *Arcam Demolition and Construction Ltd. and Hatherly Hall Ltd.*, [1966] 2 Q.B. 593 at 599.

[111] *See* note 106 *supra*.

[112] *Ash* v. *Dawnay*, *supra*, note 106.

[113] *See* text accompanying note 181 ff. *infra*.

[114] *Dodd* v. *Vail*, (1913) 3 W.W.R. 796 (Sask. C.A.); *Brook* v. *Booker*, (1909) 41 S.C.R. 331; *Gladstone* v. *Padwick*, (1871) L.R. 6 Exch. 203; *Little* v. *Magle*, (1914) 7 W.W.R. 224 (Sask. D.C.); *Lloyds and Scottish Finance Co.* v. *Modern Cars and Caravans (Kingston) Ltd.*, [1966] 1 Q.B. 764.

[115] [1898] 2 Q.B. 177 (C.A.). In *National Commercial Bank of Scotland* v. *Arcam Demolition and Construction Ltd.*, [1966] 2 Q.B. 593 (C.A.) at 599 Lord Denning does use the phrase "some responsible person" but the matter was not in issue.

> 15 (1) *No person,* whether on his own behalf or on behalf of another, directly, indirectly or through others, *shall*
>
> (a) unless there is a court order to the contrary, *remove any chattel claimed under seizure,* distress or repossession, *in the absence of the debtor, his spouse, agent or an adult resident in the home of the debtor or employed by him.*

The third essential element for a valid seizure is established when the sheriff puts himself in a position in which he *could* physically lay hands on all the goods he intends to seize even though he need not actually touch or even see everything.[117] He may, therefore, seize the whole by seizing a part. But if an asset is not actually on the premises at the time, then it cannot be said to have been seized.[118] Another possible limitation is that the goods to be seized must have been differentiated or separated out.[119]

Often the issue of whether a valid seizure has been made becomes subordinated to the alternative argument that even if the goods had been seized, the seizure has been abandoned. At one time the common law required continuous physical presence if the goods were not removed. Even temporary absence for the obtention of nourishment afforded an opportunity to argue abandonment. Decisions which held that temporary absence was not abandonment paved the way for the modern notional possession.[120]

By at least the early nineteenth century, sheriffs had discovered that the least expensive and most convenient method of retaining possession was simply to obtain an undertaking from the debtor not to remove any of the goods seized and to permit the sheriff to re-enter and take them away to sell. Such undertakings are now commonly known as walking possession arrangements or agreements and the common law has accommodated them.

The question of whether a seizure has been abandoned is one of fact and the fact which must be established is the intention of the sheriff. That of the debtor is irrelevant.[121] On the other hand, proof of intention to abandon is not alone sufficient; there must also be an actual giving up of possession.[122] The existence of a walking possession agreement is strong evidence of an on-going intention on the part of the sheriff to continue the seizure. For this reason the wording of the undertaking is crucial: if it permits the sheriff to *retake possession,* it will not constitute evidence of continuing possession. Instead it will be evidence of abandonment.[123] The mere existence of a walking possession agreement is not conclusive of continuing possession but, on the other hand, if the sheriff cannot get anyone to enter into such an undertaking, neither is its absence proof that the seizure has been abandoned even if the goods are left in the possession the debtor.[124] Evidence that the sheriff attempted to negotiate the undertaking will be evidence of his intention to seize and retain possession.[125]

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[116] Emphasis added. *See also, e.g., The Seizure Act,* R.S.A. 1970, c. 338, s. 25 (1).

[117] *Reynolds* v. *Ayers,* (1862) 10 N.B.R. 333 (S.C.); *Brook* v. *Booker, supra,* note 114; *Cole* v. *Davies,* (1871) 1 Ld. Raymd.725, 91 E.R. 1383; *Gladstone* v. *Padwick, supra,* note 114.

[118] *Dickinson* v. *Robertson et al.,* (1905) 11 B.C.R. 155 (B.C.S.C. Chamb.); *Pacific Finance Acceptance Co.* v. *Corbett,* (1977) 1 Alta. L.R. 351, [1977] 2 W.W.R. 280 (Alta. D.C.); *R.* v. *Vroom,* [1975] 4 W.W.R. 113 (Alta, C.A.). An extraterritorial seizure was upheld without comment in *Clandinan* v. *Dixon,* (1882) 9 U.C.Q.B. 266 but the issue appears not to have been argued.

Even if this element is not established, the judgment debtor may be estopped from raising the issue of the validity of the seizure if he has come to an agreement with the sheriff: *Dodd* v. *Vail, supra* note 114.

[119] *R.* v. *Luciuk,* [1926] 3 W.W.R. 453 (Sask. K.B. Chamb.). The case may be distinguishable since the judgment debtor was charged with theft and conviction depended on the validity of the seizure.

[120] *E.g., Ackland* v. *Paynter,* (1820) 8 Price 95, 146 E.R. 1142; *Bannister* v. *Hyde,* (1860) 2 E. & E. 627, 121 E.R. 235; *Jones* v. *Biernstein,* [1900] 1 Q.B. 100 (C.A.).

[121] *Ackland* v. *Paynter, supra,* note 120; *Bannister* v. *Hyde, supra,* note 120; *Bagshawes* v. *Deacon,* [1898] 2 Q.B. 173 (C.A.); *Lumsden* v. *Burnett,* [1898] 2 Q.B. 177 (C.A.); *Re Cooper,* [1958] Ch. 922, [1958] 3 All E.R. 97 (Ch. Div.); *Huxtable* v. *Conn. Simpson, Claimant,* (1904) 14 Man. R. 713 (Man. Q.B.); *Lloyds and Scottish Finance Ltd.* v. *Modern Cars and Caravans, supra,* note 114.

[122] *MacDonald* v. *Gill,* (1959) 18 D.L.R. (2d) 608 (N.S.S.C.).

[123] *Young* v. *Dencher,* [1923] 1 W.W.R. 136 (Alta. C.A.).

On the whole then, walking possession agreements having been given judicial approval, the sheriff would be well advised to attempt to persuade the debtor to enter into such an undertaking, providing it is appropriately worded, if he decides not to remove the goods or leave a man in possession. Walking possession eliminates storage problems but, of course, entails the cost of a second visit to remove the goods if they are actually to be sold. Thus, if the goods are to be sold within a short time, actual removal on the first trip is probably more efficient. The main difficulty with walking possession agreements is that by leaving the debtor ostensibly still the owner of his property, he may be encouraged to dispose of it thereby creating further problems for himself and also for the innocent purchasers[126] as goods subject to a walking possession agreement are as much *in custodia legis* as goods which have been actually removed. Therefore, there is considerable justification for regulating the mode of seizure by requiring, as in Alberta, that notices be posted, if it can be established that the posting of notices has the desired effect of protecting innocent third parties. If that effect is not achieved, then the notices serve no purpose.

All parties concerned would probably benefit from some statutory regularization of the form of such undertakings and of notification to third parties.

A further possibility, achievable only by statute, is to deem a valid seizure to be a continuing one unless expressly abandoned.[127] This would eliminate problems in establishing intention but would not prevent disposal to third parties.

(d) Goods in the Hands of Third Parties

(i) *Transferred Before Seizure*

As the preceding discussion of the law respecting the rights of entry indicated, the sheriff may sometimes find that goods belonging to the judgment debtor or in which the judgment debtor has a beneficial interest are in the possession of strangers. The stranger may simply be holding them for the debtor and may profess no proprietary interest. In this situation, the sheriff has no adverse claims to deal with. His only problem is the practical one of locating the goods for, as explained earlier, he enters the house of a stranger at his peril, his entry being validated only by the actual finding of the goods within. This poses a sufficiently difficult problem for the sheriff but it pales beside the problems engendered by adverse claims to the property.

The common law casts on the sheriff the duty to seize goods in the hands of third parties if in law they belong to the judgment debtor. In England, where the undersheriff is always a solicitor and whose family may have held the office for generations, it may have been reasonable to impose the burden of determining questions of ownership. In British Columbia, where the qualifications consist of Canadian citizenship and the desirability of a grade 12 education, the imposition of that responsibility is somewhat anomalous.

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[124] *Lloyds and Scottish Finance Ltd.* v. *Modern Cars and Caravans (Kingston) Ltd.*, *supra*, note 114.

[125] *Ibid.*

[126] *See* text accompanying note 140 ff. *infra*.

[127] *Cf. Seizures Act*, R.S.A. 1942, c. 143, s. 25 (2) discussed in *Jacobsen* v. *Feschuk*, (1953-54) 10 W.W.R. (N.S.) 439 (Alta. D.C.).

Goods may be in the possession of third parties and claimed by them as a result of some disposition which may be impugned for fraud,[128] of which the sheriff had notice or about which he was put on inquiry,[129] or as a result of some transaction which simply proves to be inadequate to pass title.[130] In either event the sheriff has a duty to inquire into the circumstances of the possession of the third party when the goods are apparently the property of the judgment debtor and is compellable by the sanction of a possible action for failing to levy to seize the goods.[131] Unfortunately for the sheriff, if the transaction is ultimately found to be valid and effective, he may be liable in damages at the instance of the third party. The right to interplead conferred on the sheriff in British Columbia by Rule 48 of the Supreme Court Rules removes much of the peril for the sheriff in seizing goods in possession of third parties because the court is given a discretion to stay actions against him, but interpleader does not abolish or in any way lessen the duty to seize from strangers if necessary.[132]

It has been suggested in one Canadian case that the sheriff should not have the burden of determining the validity of third party claims to goods of the judgment debtor and that if he has doubts, he should go to the lawyer for the judgment creditor and ask for instructions and/or an indemnity.[133] This is clearly a sound suggestion and constitutes an alternative or perhaps an addition to the interpleader option. If, however, the sheriff does not adopt either course of action suggested and fails to seize and sell the goods in question, he must be prepared to stand or fall on the validity of the claims to which he has deferred if an action is brought for failing to levy.[134]

(ii) *Transfer After Seizure*

Similarly, if after the goods have been seized by the sheriff, the debtor disposes of them, the sheriff has both the right and the obligation to seize them from third parties into whose hands they have come.[135]

At common law, this right to seize arose at the time the writ was issued. English legislation postponed the binding effect of the writ to the time when it was delivered to the sheriff.[136] In British Columbia, section 31 of the *Law and Equity Act*[137] postpones until actual seizure by the sheriff the binding effect of the writ as against *bona fide* purchasers of the goods who have no notice of the writ. Nevertheless, after seizure, even a *bona fide* purchaser for value without notice that the goods are *in custodia legis* (a situation which is entirely possible under a walking possession arrangement) may have the goods seized from him by the sheriff. Even innocent purchasers from such purchasers are not safe.[138] Complete protection only exists if sale is in market overt.[139]

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[128] Under either the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142 or the *Fraudulent Preference Act*, R.S.B.C. 1979, c. 143.

[129] *Christopherson* v. *Burton*, (1848) 3 Ex. 160, 154 E.R. 798; *Imray* v. *Magnay*, (1843) 11 M. & W. 267, 152 E.R. 803. But *see Dennis* v. *Whetham*, (1874) 9 Q.B.D. 345 which held that the liability of the sheriff depends not on notice but on whether fraud occurred in fact.

[130] *See, e.g.*, *Dewey* v. *Baynton*, (1805) 6 East. 257, 102 E.R. 1285; *Donnelly* v. *Hall*, (1885) 7 O.R. 581 (Q.B.).

[131] *Lovick* v. *Crowder*, (1828) 8 B. & C. 132, 108 E.R. 992. This is clearly the law in spite of occasional judicial opinions of sympathy for the sheriff such as Robinson, C.J. expressed in *O'Neill* v. *Hamilton, Sheriff*, (1848) 4 U.C.Q.B. 294 at 296:

> . . . it would be the height of injustice to hold a public officer responsible as a wrong-doer because he had not been able to penetrate the contrivances of these parties, framed as they were confessedly with a view to deception, and because he could not discern intuitively what, after the judicial inquiry that has been held, remains as doubtful as ever.

[132] *See* text accompanying note 353 ff. *infra*.

[133] *See* the judgment of Dubuc, J. in *Massey Manufacturing Co.* v. *Clement*, (1893) 9 Man. R. 359. For a discussion of indemnity *see* text accompanying note 361 ff. *infra*.

[134] *Massey Manufacturing Co.* v. *Clement*, *supra*, note 133 at 368 where the sheriff failed to establish the validity of all the chattel mortgages claimed by the bank and, in result, there would have been enough made from the sale of the grain to satisfy the creditor in full.

[135] *Brittlebank* v. *Gray-Jones*, (1888) 1 N.W.T. S.C.R. 5 (Man. Q.B.); *Christopherson* v. *Burton*, *supra*, note 129; *Samuel* v. *Duke and Johnson and Ford*, (1838) 3 M. & W. 622, 150 E.R., 1294.

[136] Now *Sale of Goods Act*, 1893, s. 26 (1).

[137] R.S.B.C. 1979, c. 224.

(e) Goods in the Hands of the Sheriff

Three separate problems arise with respect to property in the hands of the sheriff. First, can the sheriff seize what has already been seized by another officer? Second, can a sheriff seize property from himself? Third, can money in the hands of the sheriff be garnished? The answer in each case turns on the application of the principle that property in the hands of the sheriff is *in custodia legis* and any interference with property *in custodia legis* amounts to contempt.[140]

The first problem sounds unlikely but is theoretically possible in this province where each sheriff has province wide jurisdiction. While the second sheriff could not seize from the first, the obvious solution is the application of the *Creditor Assistance Act*. One sheriff should simply turn the writ over to the other sheriff and let the first distribute on a *pro rata* basis.

The second problem is a little more difficult as the answer is clear but the result is anomalous. This is a problem which does occur in fact although it is the third problem which occurs most frequently. The sheriff has seized goods on behalf of one judgment creditor. That creditor is himself the subject of a judgment and his creditor places a writ in the sheriff's hands before the property has been sold. The sheriff cannot seize from himself for the same reason that he cannot seize from another sheriff — goods *in custodia legis* are immune from any interference. The anomaly lies in the fact that the sheriff has to waste time by going out and seizing *other* property of the creditor who has become a debtor. It would be far more efficient if he were permitted to seize from himself.[141]

Money in the hands of the sheriff enjoys the same immunity from seizure as any other property and for the same reason — it is *in custodia legis*. In any event, unless the money is a fund originally seized *in specie* under section 52 of the *Court Order Enforcement Act*, it is not amenable to seizure because any proceeds from an execution sale or payment from a debtor constitute a debt owed by the sheriff and not a fund within the meaning of section 52.[142] Because that money is a debt, the obvious process for obtaining it from the sheriff is by way of garnishment.

In no Canadian case has the sheriff successfully been garnished, but the cases in which garnishment has been attempted turn on particular facts and should not be read as prohibiting garnishment entirely.

In *Keller* v. *Keller*,[143] the sheriff was holding a surplus for the judgment debtor. Because he failed to pay it over promptly, the debtor obtained a court order directing the sheriff to pay him the money. This court order proved to be the crucial event in the minds of the majority of the Court of Appeal when the sheriff was served with a garnishing order. Though Gordon, J.A. dissented strongly, the majority considered that to permit garnishment in the circumstances would be to permit the overturning of the court order in collateral proceedings.

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[138] *Brittlebank* v. *Gray-Jones*, *supra*, note 135.

[139] *Samuel* v. *Duke*, *supra*, note 135. It is questionable whether the concept of "market overt" is part of British Columbia law.

[140] *R.* v. *Campbell*, (1893) 14 N.S.W. L.R. (C.L.) 532 (S.C.); *DeWinton* v. *Mayor of Brecon*, (1860) 8 W.R. 385 (Ch.); *Cooper* v. *Asprey*, (1863) 32 L.J.Q.B. 209; *In Re Hogg and Christie*, (1901) 19 N.Z.L.R. 856 (S.C.); *Lane* v. *Sterne*, [1862] 10 W.R. 555 (Ch.); *Re Murphy*, (1927) 27 S.R.N.S.W. 503.

[141] *See Palmer* v. *Richards*, (1921) 30 B.C.R. 321 (B.C.C.A.); *Gregoire* v. *Markham Co. Ltd.*, (1915) 7 W.W.R. 1096 (Alta. S.C.); *Yakimishyn* v. *Bileski*, [1946] 1 W.W.R. 663 (Man. K.B.); *Wood* v. *Wood*, (1843) 4 Q.B. 397, 114 E.R. 948. The seizure is prohibited in each case but the reasons are varied.

[142] *Wood* v. *Wood*, *supra*, note 141. Section 19 (1) of the Ontario *Execution Act*, R.S.O. 1980, c. 146, removes the common law immunity for money in the hands of the sheriff by empowering the sheriff to seize "any surplus of a former execution." The result is desirable but insertion of that direction in the equivalent of section 52 in the British Columbia Act totally ignores the common law by converting a debt owed by the sheriff into a fund *in specie*.

[143] [1949] 1 W.W.R. 41 (Sask. C.A.).

In two other cases garnishment was attempted and correctly refused. In *Yakimishyn* v. *Bileski*,[144] the sheriff was holding a sum of money but on the facts, he was holding it not as a sheriff, but as gaoler. In *Toronto-Dominion Bank* v. *Shannon*,[145] the garnishor was simply another creditor of the debtor against whom writs had already been issued and levies made. Garnishment was an attempt to get priority.

The weight of non-Canadian opinion holds that, though the sheriff is an officer of the court and any money in his hand is *in custodia legis*, the law also provides that he is personally liable to the judgment creditor for the money levied and to the judgment debtor for any surplus. Each can bring an action for debt. Therefore, all the cases which have held that money in court is not garnishable are distinguishable because they turned on a holding that none of the court officers named could be personally sued.[146]

Thus, if the sheriff in British Columbia is served with a garnishing order, he should pay the money into court. If it is surplus, there will be no other claims as the judgment debtor is the only person to whom it is owing. If it is money held for the judgment creditor as the result of a levy, then compliance by the sheriff will depend on how the money was obtained. If obtained after seizure but without sale — if the judgment debtor has simply paid under pressure of seizure — then the sheriff just pays the money into court because the only person to whom it is owed is the judgment creditor.[147] If the money has been raised by way of an execution sale, however, he should pay the money into court with an explanation because that money is subject to distribution under the *Creditor Assistance Act*. The judgment creditor still has the necessary vested interest for garnishment but if any other writs or certificates are received by the sheriff within the month, then his share may be reduced.

(f) Assistance

The common law empowered and obliged the sheriff, if he even anticipated resistance in executing any writs, to call out the *posse comitatus*, and conferred on him full discretion to decide how many persons should aid him and whether arms should be carried.[148] The power was derived from the obligation and the obligation arose because it was considered[149] " . . . a disgrace to the Crown and the administration of justice, if the king's writs remain unexecuted . . . ".

Until 1976 the British Columbia *Sheriff's Act* provided:[150]

> . . . the sheriff shall take the power of the county if he finds any resistance in the execution of a writ and go in proper person.

Whether that provision qualified the common law by removing any discretion and by limiting the right to assistance to actual rather than anticipated resistance, or simply restated the common law is crucial in determining the present powers of the sheriff.

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[144] *Supra*, note 141.

[145] (1964), 46 W.W.R. (N.S.) 695 (Sask. D.C.).

[146] *Whiteley* v. *Boorina and Echuca Red Gum Co. and Ellis, Sheriff, garnishee*, (1885) 6 A.L.T. 237; *Thompson & Co.* v. *Vroenderberg* (1888), 14 V.L.R. 150; *Widdis* v. *New Boys Reef Gold Mining Co. No Liability, Williams, garnishee*, (1897) 23 V.L.R. 323, 3 A.L.R. 205; *Vernon* v. *Perry*, [1962] V.R. 223 (S.C.); *Re Greer*, [1895] 2 Ch. 217.

[147] *Creditor Assistance Act*, R.S.B.C. 1979, c. 80, s. 23. The levy is exempt from the Act so long as there are no other writs or certificates in the sheriff's hands at the time payment is made.

[148] *Miller* v. *Knox* (1838), 4 Bing. N.C. 574, 132 E.R. 910 (H.L.); *Attorney General* v. *Kissane* (1893), 32 L.R. Ir. 220 (Q.B.D.); *In re Norton*, [1918] 2 W.W.R. 865 (Alta. C.A.).

[149] *Howden* v. *Standish* (1848), 6 C.B. 504, 136 E.R. 1345 at 1351.

[150] R.S.B.C. 1960, c. 355, s. 21(2).

The *Interpretation Act* provides:[151]

> 35 (1) Where an enactment is repealed in whole or in part, the repeal does not
>
> (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect;

The key phrase is "thing not in force or existing" and the question is whether the common law rule was in force or existing in 1976 when the *Sheriff's Act* was repealed and replaced. If a statutory provision was intended as a statement of the common law for greater certainty or as a supplement to the common law rule and not as a complete replacement of the common law, then the common law is still in force if the statute is repealed.[152] If the statute modifies or narrows the common law, then presumably it replaces the common law rule with a new rule and repeal of the statute leaves a vacuum or void. Therefore, if section 21 (2) replaced the common law, British Columbia may have had an absolute void since 1976 with respect to the right of the sheriff to call for assistance. If it did not replace the common law but merely restated or supplemented it, then British Columbia retains the benefit of the common law on its repeal. The question is entirely one of statutory interpretation.

The obligation to aid the sheriff devolves on every citizen, not just on peace officers. Anyone who fails to aid the sheriff when so requested is subject to contempt proceedings.[153] Nevertheless, the class of persons on whom the sheriff is most likely to call for assistance is the police.[154]

Resistance offered to the execution of process constitutes an offence under section 118 (c) of the *Criminal Code* and particular circumstances may render the resister liable for other criminal offences such as assault or those connected with firearms.[155]

(g) Amount Seized

In the absence of specific directions from the judgment creditor as to what assets he should seize, the sheriff has sole discretion as to what to seize and how much to seize. In exercising this discretion, he must have a good sense of the values of the exigible goods for the law is clear that if he seizes too much he may be liable to an action at the suit of the judgment debtor[156] and if he seizes an insufficient amount he may be liable to an action at the instance of the judgment creditor, if it can be established that he could have seized an adequate amount and that the creditor suffered damage.[157] Obviously the sheriff must employ a fine judgment, and experience will undoubtedly be a significant factor in telling him how much can actually be levied from the goods in question.[158] Introduction of an appraisal procedure would add to accuracy in discharging this duty, but as it would also add to the cost of execution and as excessive seizure can be rectified by a properly conducted sale,[159] should a sale prove necessary, such an addition to the execution process seems undesirable.

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[151] R.S.B.C. 1979, c. 206.

[152] *Maple Leaf Lumber Co. v. Caldbick and Pierce* (1917) 40 O.L.R. 512 (Ont. C.A.); *Owen v. Daly* [1955] S.C.R. 442 (S.C.C.); *Pacific Finance Acceptance Co. v. Corbett* (1977), [1977] 2 W.W.R. 280 (Alta. D.C.).

[153] *Miller v. Knox*, supra, note 148; *Attorney General v. Kissane*, supra, note 148.

[154] *See, e.g., R. v. Todd* (1978) 6 B.C.L.R. 66 (Prov. Ct.); *R. v. Fritz* (1978) 6 B.C.L.R. 314 (B.C.S.C.); *Rogerson v. Wilkinson et al. and Fernwood Movers and Storage* [1973] 2 W.W.R. 350 (B.C.S.C.).

[155] *R. v. Ellenbaum* (1981) 10 Sask. R. 174 (Sask. D.C.). A writ founded on a void judgment will not constitute a foundation for a charge of obstruction of a peace officer (which includes a sheriff) in the execution of his duty, however, even though it could be used by the sheriff as a shield in any tort action against him for acts done by him in executing it. *R. v. Fritz*, supra, note 154.

If the sheriff asks assistance of the police, protection will be given any officer responding under the *Code qua citizen* not *qua* peace officer. *R. v. Todd*, supra, note 154.

[156] *Gawler v. Chaplin* (1848) 2 Exch. 503, 154 E.R. 590.

[157] *Massey Manufacturing Co. v. Clement*, supra, note 133.

[158] Crawford, Empirical Study, supra, note 24 at 40 states that as few as 25% are actually sold by the sheriff though that figure was arrived at by generalization from the practice of one County. Thus there may not be a large fund of experience to draw on.

A problem not uncommonly encountered is that the sheriff may seize an asset worth far more than the amount endorsed on the writ. If that is the debtor's only exigible asset, then such seizure will probably not be considered excessive.[160] There is very little authority directly on point as most cases concerning excessive seizure involved a quantity of goods. However, if an analogy is drawn with execution against land, the proposition should be valid. In British Columbia the judgment creditor may proceed against the land of the debtor regardless of whether the debtor possesses exigible personal property[161] and regardless of whether the amount owed bears a reasonable relation to the value of the land. The difficulty for the sheriff is that the pressure of work inclines him to seize the first available property with sufficient value so that he is in danger of falling into the trap that befell a Newfoundland sheriff who seized a schooner worth £600 and sold it for £400 to satisfy a judgment of £100, only to have the debtor succeed in an application to have the sale set aside because he had had enough goods in the house to satisfy the judgment.[162] The sheriff would be safer had the law cast a burden on the debtor to establish that he had informed the sheriff of the other goods in order to have the seizure declared excessive.

Where the seizure is of stock-in-trade of a retail store, the amount seized must equally be tailored to the amount of the judgment even if the sheriff enters into a walking possession agreement with permission for the debtor to continue trading:[163]

> An appropriate amount of the stock should be seized. Permission to dip into the seized stock if required for normal trading would of course tend to reduce the value of the execution: but it should not in practice be difficult to put a limit on the value of the amount of such seized stock sold in any day or longer period and to arrange in the course of visits under the walking possession agreement either to receive the proceeds of the sale or to replenish the stock by a furthur levy.

Property whose value is prone to fluctuation, such as shares, poses a virtually insoluble problem of determining precisely the right amount which should be seized. The sheriff cannot know what the value of publicly traded shares will be at the time of sale or even, in the case of private companies, what the value is at the time of seizure.

(h) Exemptions

The existence and proper extent of exemptions generally are matters on which various studies have been done in recent years. In contrast, the only problem to be discussed here is the duty of the sheriff under the existing legislation in force in British Columbia.

Section 64 of the *Court Order Enforcement Act* greatly enlarges the common law exemption of wearing apparel actually in use[164] and makes provision for exemption of goods and chattels at the option of the judgment debtor to a value of two thousand dollars ($2000).[165] Subsections (2) and (3) respectively, exclude goods and chattels for which the debt was contracted and the stock in trade of a debtor/trader. Section 65.1 exempts from seizure or sale works of art or other objects of cultural or historical significance brought into the province for temporary public exhibit, unless the execution is on a judgment respecting a contract for the transportation, warehousing or exhibition in the province or unless the object is offered for sale.

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[159] *See* text accompanying note 203 ff. *infra*.

[160] *Woodlife* v. *Coles*, (1595) Noy 59, 74 E.R. 1027. *See also* F.J. Hawkins, "What is an Excessive Levy?" (1961) 35 Aust. L.J. 71.

[161] *Re Execution Act, Re Schiava's Judgment*, (1960) 32 W.W.R. 239 (B.C.S.C.).

[162] *Deputy Sheriff, Harbor Grace* v. *Pynn*, (1819) 1 Nfld. L.R. 148.

[163] *In Re Dalton*, [1963] Chanc. 336 at 346. *See also Watson* v. *Murray*, [1955] 2 Q.B. 1 in which Hilbery, J. found that seizure of the entire stock was excessive. Both cases acknowledge, however, that such an arrangement causes no real damage to the debtor.

[164] C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (1981) at 316.

[165] The exemption is available both for goods and chattels wholly owned by the debtor and for those in which he merely has a beneficial interest: *Re Ottaway*, (1980) 20 B.C.L.R. 313 (B.C.C.A.).

Section 66 provides:

> 66. (1) Every sheriff or other officer seizing the personal property of a debtor under a writ of execution, shall allow the debtor to select goods and chattels to the value of $2000 from the personal property seized, and shall . . . make every reasonable effort to inform the debtor of the services and advice available under the *Debtor Assistance Act*
>
> (2) Every debtor whose personal property has been seized may, within 2 days after the seizure or notice of it, whichever is the longer time, select goods and chattels to the value of $2000 . . .

Subsequent provisions contain a direction to the sheriff to withdraw if the goods are worth less than $2000 and contain a rather complex appraisal procedure if there is a dispute about the value of the goods selected.

The practice of the sheriff in British Columbia has not been uniform.[166] Sometimes the debtor is informed of the right to claim an exemption. Sometimes the sheriff simply refrains from levying the household goods which would probably be claimed by the debtor. This variation is possible because the exact obligation of the sheriff has never been clear. The cases have decided that the exemption is not absolute and that the sheriff is under no duty to leave two thousand dollars worth of property and they have decided that the time within which the right must be perfected by a claim is within two days of the seizure or notice of the seizure.[167] What has not been decided, though it was suggested by McPhillips, J.A. in *Roy* v. *Fortin* in a strong dissent,[168] is whether the sheriff has a duty to inform the debtor (or anyone defined in section 64) of the existence of the right to claim the exemption. Common knowledge of the existence of the exemption and the necessity of claiming it is doubtful. Unless, therefore, the sheriff informs the debtor, the right is meaningless. It seems anomalous that the sheriff is clearly under an obligation to inform the debtor of the services and advice available to him under the *Debtor Assistance Act*,[169] but that a duty to inform the debtor about the exemption has not been established.[170]

Though the law still remains as unclear as ever, a circular from the Ministry of Attorney General in October, 1982 attempts to remedy this *casus omissus* by directing that the debtor be informed in every case of his right to claim an exemption. This action flowed from complaints by debtors to the provincial Ombudsman.

The exemption for works of art in section 65.1 omits the phrase "at the option of the debtor" and could be interpreted as an absolute exemption which would impose a duty on the sheriff to refrain from seizing.

Similarly, the federal *Indian Act* appears to create an absolute exemption which the sheriff would have a duty to respect:[171]

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[166] Crawford, Empirical Study *supra*, note 24 at 19

[167] *Lee* v. *Colonial Cabinets*, [1978] 5 W.W.R. 27 (B.C.C.A.), *aff'g Roy* v. *Fortin*, (1915) 9 W.W.R. 407 (B.C.C.A.), explaining *Fletcher* v. *Pendray*, (1916) 10 W.W.R. 444 (B.C.C.A.)

[168] *Supra*, note 167. *But see Ross* v. *Grange*, *Sheriff*, (1866) 25 U.C.Q.B. 396 (C.A.) in which Morrison, J. states at 397, "If the sheriff seize goods he is liable for them, no matter what becomes of them . . ." The goods in *Ross* had been destroyed by fire but on the pleadings, it was unclear whether they had been seized yet. The learned judge seems to be more concerned about the judgment debtor than about the sheriff and that may explain the statement.

[169] *Court Order Enforcement Act*, s. 66 (1).

[170] Crawford, Empirical Study *supra*, note 24 at 18-19 found that the practice varied from debtor to debtor and county to county.

[171] R.S.C. 1970 c. I-6. Section 90 expands the meaning of the phrase "situated on a reserve."

> 89. (1) Subject to this Act the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, attachment, levy, seizure, distress or execution in favour of or at the instance of any person other than an Indian.

Personal property of a non-Indian found on a reserve should fall within the ordinary provisions of the *Court Order Enforcement Act* as discussed and so, presumably, should personal property of an Indian or a band if the judgment creditor is another Indian. Thus, location and status must both be considered by the sheriff.

Many statutes, both federal and provincial, contain provisions creating exemptions for the benefits paid pursuant to them.[172] These exemptions are considered most frequently in garnishment proceedings which in British Columbia ordinarily do not involve the sheriff. However, if he attempts to seize a cheque under section 52 of the *Court Order Enforcement Act*, he may find he has seized exempt property. The extent of the immunity granted will, of course, depend on the proper interpretation of the particular statute but the general rule was well stated recently by the New Brunswick Court of Appeal in *Toronto-Dominion Bank* v. *Grossman*,[173] a case concerning a pension benefit cheque payable under the provincial *Public Service Superannuation Act:*

> . . . pension benefits are, when exempted from attachment by statute, not attachable until they lose their character as such and . . . they only lose their character as such when the pension fund has actually divested itself of the money and it has reached the pensioner.

Whether a sheriff would be entitled to seize a fund of money resulting from cashing such a cheque is unclear. If the immunity is lost the minute the benefit "reaches" the debtor, then the sheriff could stand at his elbow while he cashes the cheque and then seize the money under section 52. If the test is that used by the Manitoba court in *Holy Spirit Parish Credit Union* v. *Kwiatkowski*,[174] namely, identifiability of the fund as a benefit, then the sheriff could not seize until it was mixed with other monies or used to purchase exigible property.

In summary, then, if the exemption is a right which must be perfected by claiming it, the sheriff is under no duty to refrain from seizing but, in practice he has been directed to inform the debtor of his rights. However, an amendment to the *Court Order Enforcement Act* would be desirable for greater certainty. If, on the other hand, the exemption is absolute, then the sheriff has a duty not to seize. Any such seizure will be illegal as will any sale of the exempt goods and the court has the power to set aside the sale.[175]

Under the present legislation and Rules of Court, it is not immediately obvious what procedure should be taken if the sheriff and the judgment debtor disagree as to whether a particular item is exempt (and the problem is not just one of valuation for which the *Court Order Enforcement Act* does provide an appraisal procedure). Rule 48 (2) (a), which provides interpleader relief for the sheriff, is probably sufficiently broad to cover the situation. "A person who makes a claim" is usually a third party but a debtor claiming an exemption could also fit within the phrase. Interpleader relief was the procedure used in *Lee* v. *Colonial Cabinets*,[176] where the issue was the existence of the exemption.

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[172] *E.g.*, *Canada Pension Plan Act*, R.S.C. 1970 c. C-5, s. 64; *Family Allowance Act*, S.C. 1973, c. 44, s. 8; *Old Age Security Act*, R.S.C. 1970, c. O-6, s. 21; *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, s. 48. *Criminal Injuries Compensation Act*, R.S.B.C. 1979, c. 83, s. 11; *Workers Compensation Act*, R.S.B.C. 1979, c. 437, s. 15.

[173] (1982) 132 D.L.R. (3d) 566 at 570 (N.B.C.A.).

[174] (1969) 68 W.W.R. 684 (Man. Q.B.).

[175] *See* text accompanying note 242 ff. *infra*.

[176] *Supra*, note 167.

Alternatively, Rule 42 (26) empowers a sheriff, a judgment creditor, or a judgment debtor to apply for directions concerning the sale of any property taken in execution and might also provide a procedure for determining the existence of an exemption. This alternative would be inappropriate, of course, if money *in specie* or a cheque were seized as there is no sale then.

Another possibility under the present law would be for the debtor to use Rule 45 and apply for an injunction prohibiting the sale or he could bring an action in conversion against the sheriff.[177]

(i) Priority

If the goods of the judgment debtor happen to be seized on premises held in commercial tenancy, the sheriff must get the judgment creditor to pay the landlord any arrears of rent not exceeding one year, before removal of the chattels.[178] This is a provision which first appeared in England as 8 Anne, c. 14, s. 1 and has been re-enacted in British Columbia. Until 1974 it applied to both residential and commercial tenancies (as now characterized) but was not carried forward or incorporated by reference into the *Residential Tenancy Act*[179] when the landlord's right of distress against a residential tenant was abolished. Why the landlord of a commercial tenancy remains favoured and the landlord of a residential tenancy has to take his chance with all other creditors defies reason and logic but the distinction is one of which the sheriff in British Columbia must be conscious. If he sells without reserving the rent which he knows to be due, he will be liable to the landlord. The responsibility is mitigated somewhat by a rule that the burden rests on the landlord to establish the arrears and more than a simple, verbal claim is necessary. The lease may have to be produced.[180]

(j) Care of Goods in Custodia Legis

The sheriff has a duty to take reasonable care of goods which he has seized and removed. Whether he will ever be held to be absolutely liable is doubtful. One Newfoundland case, *McDonald* v. *Nugent*,[181] states categorically that he will not and the rationale advanced is the necessity of allowing the sheriff to discharge his duties with some assurance of safety. In other cases in which goods were lost or damaged, the sheriff clearly was negligent so the issue of absolute liability was not before the courts.[182]

Normally a relatively straightforward duty, care and custody of seized goods can constitute a real dilemma for the sheriff when the goods consist of growing crops. A common practice in the prairie provinces is to seize the grain crop at various stages of marketability. The Manitoba Court held in *Massey Manufacturing Co.* v. *Clement*,[183] that the sheriff who had seized grain in stooks was not obligated to see to the threshing, the carrying to market and the sale in final form of the grain. His only obligation was to sell the stooks.[184]

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[177] *Byers* v. *Murphy*, (1893) 3 Terr. L.R. 169; *see also*, "Remedies Available to a Judgment Debtor Whose Exempt Property Has Been Sold Upon Execution" (1955) 40 Iowa L.R. 364. The premise appears to be that sale by the sheriff of exempt property constitutes a species of oppression—or a form of abuse of process and that it would render the sheriff liable not only to compensatory damages, but even possibly to exemplary damages.

[178] *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 1; *see also Andrews* v. *Dixon*, (1820) 3 B. & A. 645, 106 E.R. 797. The Law Reform Commission of British Columbia has recommended that this provision be repealed. *See Report on Distress for Rent* (LRC 53, 1981).

[179] R.S.B.C. 1979, c. 365.

[180] *See generally*, C. Churchill, *The Law of the Office and Duties of the Sheriff* (2d. ed 1882) at 325 ff.; *Keightley* v. *Birch* (1814) 3 Camp. 521, 170, E.R. 1467; *Augustien* v. *Challis*, (1847) 1 Ex. 279, 154 E.R. 118.

[181] (1859) 4 Nfld. R. 376.

[182] *Bennett* v. *Stephenson*, (1860) 4 Nfld. L.R. 447; *Watson* v. *Murray*, [1955] 2 Q.B. 1. In *Willett* v. *Sparrow*, (1816) 2 Marsh. 293, 128 E.R. 1159 the sheriff was alleged to have "wasted the property in a riotous and shameful manner" but unfortunately no details were given. G.S.A. Wheatcroft, "Sheriff's Liability to the Judgment Debtor" (1955) 105 L.J. 227 at 228 comments that the issue of absolute liability was left open in *Watson* v. *Murray*, but takes no position.

[183] (1893) 9 Man. R. 359.

Care and custody of perishable goods obviously impose a duty of a very speedy execution sale. This duty was implicit in the now repealed section 142 of the *County Court Act* which imposed a five day mandatory interval between seizure and sale *except* in the case of perishable goods. Discharge of this duty is complicated at the moment in British Columbia by uncertainty as to the mode of sale. The practice in Vancouver is to sell by public auction because the right of the sheriff to sell privately is uncertain. Since he advertises only once a week and sells only once a week, the average time from seizure to sale is about two weeks — too long for perishables. The only way that the duty of care can be discharged when perishables are involved is by speedy sale so the sheriff must either sell privately or apply to the court for directions.

The duty of the sheriff if he seizes a partial interest in goods or chattels is less clear. Is he required to make payments as they fall due in order to preserve the interest of the judgment debtor? Again, a speedy sale before any payments fall due obviously resolves any uncertainty on this point, but such precise timing is not always achievable. An obligation to make such payments, if necessary, would seem to be a logical extension of the duty to care for the goods between seizure and sale.

This seizure problem was recognized and considered recently by the Ontario Law Reform Commission,[185] and it was recommended that the sheriff should have the right, when financed by creditors, to make any such payments and, in the absence of financing, to apply to the court for an order staying any repossession and sale proceedings contemplated by the secured party. Clearly, the financing of such payments is the problem and the recommendations are equally applicable in British Columbia. The only puzzling aspect of the discussion is the implicit assumption that the sheriff is not presently entitled to so act. A consideration of the general duty of care of goods imposed by the law on the sheriff leads to the conclusion that the question is one of obligation.

(k) Seizure of Particular Kinds of Personal Property and Interest

The discussion above has been premised on the existence of tangible goods and chattels capable of manual seizure. These are not, however, the only kinds of personal property subject to execution under a writ of seizure and sale.

(i) *Non-possessory Interests*

The beneficial interest of a judgment debtor is rendered exigible by section 56 of the *Court Order Enforcement Act* and Rule 2104 of the Federal Court Rules. The *Supreme Court Act* and Rules speak of writs of *fieri facias* against goods and lands,[186] but make no express reference to partial interests.

A judgment debtor's beneficial interest may be non-possessory: he may be a vendor under a conditional sale contract or a mortgagee under a chattel mortgage agreement. It is a fundamental principle of debtor/creditor law that a sheriff can seize only the interest of the judgment debtor in the property so if the judgment debtor has no right to possession, then neither should there be any right in the sheriff. If the sheriff at no point has a right to possession, it is difficult to see how he can successfully sell the interest of the judgment debtor even if he can effect seizure by entering into some form of walking possession agreement with the party in possession as to the seizure of the debtor's interest even though such sale may be theoretically possible.

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[184] Reimbursement for expenses may be a problem if he does more. *See also, e.g., Sturgeon v. Henderson*, [1917] 3 W.W.R. 56 (Man. K.B.).

[185] *The Enforcement of Judgments and Related Matters* 1982, Part II at 53-55.

[186] Rule 110. Curiously, Form J. directs the sheriff to make only from goods and chattels and omits any directions to make from lands.

If such interests are to be effectively exigible under writs of seizure and sale, then a special procedure for levying upon them needs to be created. In this respect the *Execution Act* of Ontario[187] could serve as one model. The procedure prescribed therein is for the sheriff to give notice to the office where the particular contract is registered and to the mortgagor or person liable to pay the money to the judgment debtor. Payment must from that point be made to the sheriff of all monies then owing and of all monies that become payable, as they fall due, until the execution is satisfied. The sheriff rarely knows about non-possessory interests, however, and as garnishment would catch the payments the problem is surmountable by other means.

The Law Reform Commission of British Columbia in its 1978 *Report on the Attachment of Debts Act* took a different view of this problem. It regarded the asset to be realized upon a "chattel paper" — a form of quasi-negotiable instrument and suggested that the proper course was to seize the paper. Recommendations were made that the exigibility of chattel paper under section 52 of the *Court Order Enforcement Act* be clarified and that account payments arising under chattel paper should *not* be subject to garnishment.

(ii) *Money and Securities for Money*

The *Judgments Act* of 1838[188] first authorized the sheriff to seize money and other securities for money under a writ of *fi.fa*. That section is reproduced in sections 52-55 of the *Court Order Enforcement Act*. The mode of seizure is the same as for choses in possession, relying on the dual aspect of chattel paper.

Money sitting in a cash register is clearly exigible under this section but there is another problem with seizing it. It is possible that some of that money may not be the property of the judgment debtor and that the sheriff will be liable for trespass. Whether sales tax, for example, collected by the debtor for the government is the property of the debtor or just a debt owed to the government depends on the proper interpretation of the relevant statute. Although it may be safe to advise the sheriff to seize and to rely on the protection of interpleader, it would be better to provide legislative direction in this area. The interpleader proceeding would be of limited use as an honest mistake could be made by the sheriff only once.

Section 52 directs the sheriff to pay over any money or banknotes seized directly to the judgment creditor. It is unclear whether distribution under the *Creditor Assistance Act* is avoided. An argument to that effect was made in *Adam* v. *Richards*[189] on historical grounds and on the basis of the wording in the statute. Two members of the British Columbia Court of Appeal took strong exception to the argument and it is doubtful if such an argument would meet with any greater success today. If, then, the sheriff seizes money or banknotes, he should retain them for distribution under the *Creditor Assistance Act* unless at the time he has no other writs or certificates in his hands so that they fall within the exception provided for in section 23.

The other classes of personal property were not considered amenable to sale under the writ either. The levy is to be accomplished only by payment from the party liable on the bond, promissory note, etc. The sheriff is, therefore, empowered to sue in his own name if the party liable does not pay over voluntarily. There is, however, no duty to sue unless the execution creditor undertakes to indemnify him by entering into a bond with two sureties against all the expenses and consequences of such litigation. The complication of litigation does not encourage execution against such property. It might be more useful if the burden of conducting litigation were placed on the creditor as the *County Court Act* used to provide or if the sheriff was empowered to sell as he is in Ontario.[190]

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[187] R.S.O. 1980, c. 146, ss. 21-26

[188] 1 & 2 Vict. c. 110, s. 12

[189] (1915) 8 W.W.R. 701, 21 B.C.R. 212 (C.A.)

(iii) *Shares*

The *Court Order Enforcement Act* renders shares in all corporations subject to seizure and sale under a writ of execution, in addition to incorporating by reference the charging order created by the *Judgments Act*, 1838 and 1840. Shares in both private and public (or non-reporting and reporting) companies are exigible.[191]

The law concerning the proper mode of seizure by the sheriff is at present in an unfortunate state of uncertainty. *Prima facie* the Act provides for seizure of shares by a notice procedure set out in sections 59 to 61. The sheriff is directed to serve on the corporation a copy of the writ of execution and from the time of service of that copy, the shares and any dividends, premiums, bonuses or other pecuniary benefits are bound. Notice can be served at any place authorized by the Rules for service on corporations. The original purpose of the notice procedure was to render seizure of shares easier for the sheriff. Shares constitute a chose in action, an invisible form of personal property. Though share certificates are evidence of the property, they do not constitute the property itself and anyway are extremely difficult to locate. Shares, moreover, at common law have a location at the head office of the company. By including section 61, the *situs* provision deeming shares to be located wherever notice could be served on the company, the single *situs* rule is reversed and it is more likely that the local sheriff will be able to effect seizure.

A secondary result of the notice procedure is that it enables the judgment creditor to execute against shares in non-British Columbia corporations because corporate presence in the province permits service and service permits seizure.[192]

Three cases in the British Columbia Supreme Court have cast doubt both on the status of the notice procedure and on its application to shares in foreign corporations.

The first case, *Re Patmore*,[193] decided that if the shares were in bearer form, the notice procedure was optional. The shares were held to be equivalent to money and so were exigible under section 52 (then section 12) of the Act.The sheriff could seize the share certificates both of British Columbia corporations and of foreign corporations because the certificate was the property. The case did not discuss the question of whether the sheriff was to treat the certificates as money for *all* purposes, however, so it remained unclear whether he was to sell as he is directed to do when executing against shares or to pay over directly to the creditor as he is directed to do when executing against money or banknotes.

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[190] *Execution Act*, R.S.O. 1980, c. 146, s. 19 (3).[191] *Associates Finance* v. *Webber and Dixon*, [1972] 4 W.W.R. 131 (B.C.S.C.).

[191] *Associates Finance* v. *Webber and Dixon*, [1972) 4 W.W.R. 131 (B.C.S.C.).

[192] This effect was recognized in Ontario relatively early: *Malouf* v. *Labad*, (1912) 3 D.L.R. 755, (Ont. Div. Ct.); *Herold* v. *Budding*, (1916) 37 O.L.R. 605 (Ont. H.C.). Since British Columbia borrowed its provisions from the Ontario *Execution Act*, the Ontario decisions are directly on point.

[193] (1962) 39 W.W.R. 460 (B.C.S.C.).

In the next case, *O'Hara* v. *Fox*,[194] the court also held that the proper method of seizing shares was to seize the certificates but not because they were in bearer form and so like money. *Re Patmore*, which could have been invoked, was not discussed. Instead the operative section was held to be section 58 which provides that shares are to be seized and sold "in a similar manner as other personal property." The notice procedure in the following sections was held to relate only to transfer, not to a mode of seizure. As far as the meaning of the direction in section 58 is concerned, the interpretation given is completely accurate. In 1832, the colony of Upper Canada passed legislation making shares exigible[195] and the key provision was virtually identical to the present section 58. The sheriff executed from 1832 to 1877 in that colony/province by seizing the certificates. In 1877, however, the notice provisions were introduced as a mode of seizure for the reasons outlined above.[196] *O'Hara* is incorrect, therefore, in the interpretation placed on the notice provisions, but as the case has never been overruled, the question of the legality of seizing by notice remains in some doubt and this is of some importance as the sheriff continues to seize by that method. If the certificates are discovered he will, of course, seize them too but will also give notice, a practice said to be unnecessary by *Patmore* for bearer shares. Since *O'Hara* seems to say that the only method of seizing any shares is to seize the certificates pursuant to section 58, the authority of *Re Patmore* may be doubted.

Resolution of the uncertainty is desirable. Seizure by notice is easy to accomplish but does often result in the sheriff seizing property belonging to a third party if the shares are in bearer form and this requires the use of the interpleader process for resolution. Seizure of the certificates reduces this possibility. Some provinces require both seizure of the certificates and notification to the company for all types of shares.[197] Since certificates are generally very difficult to locate in the absence of cooperation from the debtor and since the sheriff rarely encounters third party problems when seizing shares in private companies, perhaps the best solution is to have two modes of seizure. For shares in private companies the proper mode would be by notice. For shares in public companies which are so often in bearer form, seizure could be accomplished only by seizing the certificates and by giving notice. The onus would be on the judgment creditor to inform the sheriff not only that he wants shares seized, which he must do now anyway, but also whether the company is public or private. Legislation would be necessary, of course, to accomplish this.

The third British Columbia Supreme Court case creating uncertainty in this area is *Vancouver A. & W. Drive Ins Ltd.* v. *Komarnisky*,[198] where Fulton, J. reluctantly held that the provisions in the *Court Order Enforcement Act* permitted execution against shares only in British Columbia companies because he was "unable" to find any other way of interpreting the phrase "in the Province" in section 58. The effect of the *situs* provision (section 61) and the possibility that the phrase might refer to corporate presence sufficient for service were not evident to the learned judge. The result is that the sheriff no longer seizes shares in foreign companies. Since such shares had often been seized and apparently no problems of corporate refusal to cooperate had arisen in the past, the *Vancouver A. & W.* case is most unfortunate. It contradicts Ontario authority interpreting the same provisions and it renders immune property of a judgment debtor which was formerly exigible. Legislative overruling is unnecessary because the statute is already clear, but the issue will only arise for reconsideration by the courts if the sheriff continues to refuse to seize shares in foreign corporations when called upon to do so by a creditor who has the wherewithal to make good a suit for damages stemming from the refusal.

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[194] Unreported B.C.S.C., 1973, Cranbrook Registry No. 98/73.

[195] 2 Will. IV, c. 6.

[196] *Execution Act*, R.S.O. 1877.

[197] *Seizures Act*, R.S.A. 1970, c. 33; *Executions Act*, R.S.S. 1978, c. E-12; *Seizures Ordinance*, R.O.N.W.T., 1974, c. S-7; *Executions Ordinance*, Y.T. 1980, c. 8.

[198] (1981) 13 B.L.R. 89 (B.C.S.C.).

(l) Effect of Illegal Entry and Seizure

If the sheriff either enters or seizes illegally, he will be liable for damages at the instance of the injured party. Illegality does not render the act void, but it does vest the court with a discretion to set it aside. Even a sale following an illegal entry or seizure may be set aside. Success in such application to set aside seems to depend on the egregiousness of the illegality.[199]

(m) Demeanor of the Sheriff

The common law has never concerned itself with the question of whether judgment debtors and their families were offended by the manners of the officer executing the process. Bailiffs, who did most of the actual work, were considered to be inherently offensive anyway[200] and trespass actions normally included a complaint about the disturbance they caused.

Concern for the effect of collection or seizure on the debtor is a modern phenomenon. Nothing in the *Debt Collection Act*[201] really meets debtor complaints about rudeness and abrasiveness in seizing. Even if many complaints are not in fact justified, the general intent of the *Debt Collection Act* should still be borne in mind by sheriffs' officers in executing judicial process. Moreover, it is just possible that a court might find that complaints about attitude and conduct constitute a substantial grievance on an interpleader proceeding and might therefore refuse to stay or prohibit an action against the sheriff.[202]

4. SALE

Sale of the goods seized is an integral part of the execution of the writ. No right resides in the sheriff to seize and then simply hold in order to exact payment or a compromise from the judgment debtor,[203] nor may he simply transfer the goods to the execution creditor.[204] On the other hand, if the seizure of the goods does result in payment in full either to the sheriff or to the execution creditor, then the sheriff's right to retain the goods *in custodia legis* expires and he must immediately release them to the execution debtor.[205]

A not uncommon practice in British Columbia is for the sheriff to take a walking possession agreement in combination with an undertaking to pay the amount of the judgment in instalments or even to take an undertaking to pay instalments when there is nothing to seize.[206] Strictly speaking, this is an illegal practice as it is clearly in breach of the duty to sell. On the other hand, he is levying and if neither the execution creditor nor the execution debtor object, the practice will obviously continue. It may be desirable, however, that the practice be authorized by statute. If the sheriff should withdraw the seizure on the debtor undertaking to pay, he would no longer be in breach of the duty to sell which arises on seizure.[207] Again, this is unlikely to meet with complaints for failing to seize because he is collecting.

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[199] *Hooper* v. *Lane*, (1857) 6 H.L.Cas. 443, 10 E.R. 1368; *Hudson* v. *Fletcher*, (1909) 12 W.L.R. 15 (Sask. Q.B.).

[200] *Sanderson* v. *Baker*, (1772) 3 Wils. 309, 95 E.R. 1072 described bailiffs as the "most abandoned and wicked set of men."

[201] R.S.B.C. 1979, c. 88.

[202] *See Smith* v. *Critchfield*, (1885) 14 Q.B.D. 873 (C.A.) where Brett, M.R. at 879 suggested that "insolent or oppressive conduct" might be considered a substantial grievance.

[203] *Mead and Mead* v. *Hamilton*, (1845) 2 U.C.Q.B. 135; *Associates Finance Co. Ltd.* v. *Webber and Dixon*, [1972] 4 W.W.R. 131 (B.C.S.C.).

[204] Atkinson, *supra*, note 1 at 182 citing *Bealy* v. *Sampson*, 2 Vent. 95, Dalt. 526; *Thomson* v. *Clerk*, Cro. Eliz. 504, 78 E.R. 754.

[205] *Barker* v. *St. Quintin*, (1844) 12 M. & W. 441, 152 E.R. 1270; *Lefans* v. *Moregreen*, (1663) 1 Keble 655, 83 E.R. 1167.

[206] Crawford, Empirical Study, *supra*, note 24 at 33 ff.

One problem which may arise in either case is that the writ will expire before the amount is fully paid.[208] If the duty of the sheriff to notify the execution creditor of the imminent expiry of the writ were made express, this potential problem of unauthorized levies could be avoided. A still better practice, however, would be for the sheriff to discharge his duty under section 66 (1) of the *Court Order Enforcement Act* and refer the debtor to the Debtor Assistance Division.

There is only one mandatory statutory provision in force today in British Columbia with respect to execution sales. Section 9 (1) (b) of the *Sheriff Act* prohibits, and renders an offence, any acquisition, direct or indirect, of property disposed of under execution by a sheriff on the part of a "director, sheriff or other person acting under the authority of the director or sheriff." The five day waiting period after seizure applicable to execution issuing from County Court no longer exists, having been repealed in 1976. Sales under writs of *fieri facias* from the Supreme Court of Canada and from Federal Court are to be conducted according to the law of the province.[209]

(a) Time

The common law imposes the same duty on the sheriff with respect to the time within which he must sell the seized goods as it does with respect to the time allowed for seizure after the delivery of the writ: the sheriff must exercise due diligence and sell within a reasonable time. The circumstances will, of course, determine what is reasonable.[210]

At the same time, the sheriff must not proceed with such haste that the sale is improperly conducted and an inadequate price obtained as happened in *Smith v. Colles*.[211] There the sheriff seized goods on the same day that he had received the writ. He advertised the sale in the next morning's papers and conducted an auction that afternoon. Barry, A.J.C., commented that the sheriff appeared:[212]

> . . . to have been affected not so much by the stimulus of discreet diligence as by the influence of panic. He listened complacently to rumours which turned out to be absolutely without foundation.

Damages were awarded against the sheriff for negligence.

(b) Mode

The common law imposes no particular mode of sale. It leaves to the sheriff's discretion the decision whether to sell by public auction or private tender.[213] His prime obligation is to obtain an adequate price and he must decide which mode will better discharge that duty.

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[207] Withdrawal appears to be the English practice: "The Benefit of Execution" (1935) 79 Sol. J. 58.

[208] *See* text accompanying notes 31-41, *supra*.

[209] Supreme Court of Canada Rules, R. 114 *Federal Court Act*, s. 56 (3); Federal Court Rules, R. 2108.

[210] *Jacobs* v. *Humphrey*, (1834) 2 C. & M. 413, 149 E.R. 821; *Aireton* v. *Davis*, (1833) 9 Bing. 740, 131 E.R. 792; *Carlile* v. *Parkins*, (1822) 3 Stark 163, 171 E.R. 809.

[211] (1871) 2 V.R. 195 (S.C.).

[212] *Ibid*. at 196.

[213] *Ex parte Villars, In Re Rogers*, (1874) L.R. 9 Ch. App. 432, *Edge* v *Kavanagh*, (1888) 24 L.R. Ir. 1; *Clarke* v. *Nicholson*, (1835) 3 Dowl. 454, 149 E.R. 1272.

In England, by section 145 of the *Bankruptcy Act, 1883*, sales for more than £20 must be by public auction after specified advertising unless the court orders otherwise. Either the sheriff or the execution creditor may apply to the court for a variation from public auction. Sales in breach of the requirements of section 145 are still valid, however, and are not impeachable if both the execution creditor and the executor debtor had knowledge and raised no objections.[214] Otherwise they may be set aside on application by a creditor.

In 1915 the British Columbia Court of Appeal, in *Roundy* v. *Salinas*, held that British Columbia was subject only to the common law.[215] Yet it is commonly believed that the sheriff must sell by public auction. This misconception may have been caused in part by blind adherence to the English laws but it may also have arisen through a perception that the best and safest method of obtaining an adequate price is to sell by public auction. Many Legislatures in other jurisdictions have for this reason imposed a legislative duty on the sheriff to sell by public auction.

The only statutory change since the decision in *Roundy* v. *Salinas*, is in the wording of the process itself. The writ of *fieri facias* used in British Columbia until 1976 simply directed the sheriff "to cause to be made" from the goods the necessary amount. Now Form 42 directs the sheriff "to seize and sell at public auction or by tender." Unless the term "public" is held to modify both "auction" and "tender," there is no basis for an argument that the common law rule has been qualified. The terms auction and tender are disjunctive and a tender is simply an offer.

Since there are circumstances in which it would be advantageous for the sheriff to sell privately, rewording of the direction in Form 42 for greater certainty is called for. Until the interpretation advanced above is confirmed, the sheriff has two options. He may act at his peril and sell by private tender or he may ask the court for directions because the law in British Columbia does relieve the sheriff of *exclusive* discretion as to the mode of sale. Rule 42 (26) authorizes the judgment creditor, the judgment debtor or the sheriff to apply to the court for directions under Rule 43 concerning the sale of any property taken in execution.

Sale by public auction, if that is the mode selected, will impose concomitant duties: the sale must be properly advertised,[216] goods must be properly lotted,[217] and the actual sale properly conducted. It is probably unwise, for example, to announce any reserve price in advance, though that by itself will not constitute grounds for setting the sale aside.[218] The sheriff must clearly indicate to the assembled bidders that unless there are further bids, the property will be knocked down to the last bidder.[219] The sheriff need not conduct the sale personally and if he hires an auctioneer, the cost of the auctioneer is probably a necessary and reasonable disbursement which is deductible.[220] It is irrelevant how many persons actually attend as long as the price obtained is adequate.[221]

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[214] *Crawshaw* v. *Harrison*, (1893) 63 L.J.Q.B. 94.

[215] *Roundy* v. *Salinas*, (1915) 8 W.W.R. 912 (B.C.C.A.).

[216] *Edge* v. *Kavanagh*, *supra*, note 213; *Wright* v. *Child*, (1866) L.R. 1, Ex. 358.

[217] *Wright* v. *Child*, *supra*, note 216.

[218] *Anderson* v. *Liddell*, (1967-68) 117 C.L.R. 36 (H.C. Aust.).

[219] *Nova Scotia Savings and Loan Co.* v. *Hill*, (1981) 126 D.L.R (3d) 514 (N.S.S.C.) This case deals with a foreclosure sale but the principle is the same. The sale was set aside because the court decided that the practice which the sheriff had followed for four years did not make clear that the bidding was about to end. The fact that there was another bidder present ready to offer $10,000 may have influenced the court.

[220] Though that was not always the case: *Woodgate* v. *Knatchbull*, (1787) 2 T.R. 148, 100 E.R. 80.

[221] *McNichol* v. *McPherson*, (1907) 15 O.L.R. 393 (H.C.).

Sale of shares in a private corporation is a special problem. In *Associates Finance* v. *Webber and Dixon*, having held that such shares were exigible in spite of restrictions on transfer, Anderson, J. attempted to protect the interest of the corporation by directing that the sheriff should sell "in accordance with the articles of association."[222] A public auction, then, is highly unlikely as a first step. The sheriff has the obligation of ascertaining how the articles restrict transfer, if at all, and then complying with those restrictions. The present practice is to offer the shares first to the directors of the company. While not strictly complying with the case, the practice probably often conforms to the requirements contained in the articles of association.

If sheriffs in British Columbia operate in a state of uncertainty as to *where* the sale may take place, their puzzlement merely reflects the state of the law. In the early cases, it was not uncommon for a sale to take place on the property of the debtor and such an occurrence was usually reported simply as a fact and without comment. The Irish courts were of the opinion that that was the *proper* place for the sale.[223] In contrast, more recent cases have held that sale on the debtor's property will be a trespass if he refuses permission and if it is possible to hold it elsewhere.[224] If removal is an impossibility, as opposed to merely very difficult, then sale on the premises is probably not a trespass.

The sale need not be conducted at the actual location of the goods. When the sheriff has property such as standing grain or logs in the woods[225] or heavy equipment,[226] there are obvious difficulties. A prerequisite for such a sale, however, is that the property have been validly seized by the sheriff so he knows what he is selling and is not simply giving the purchaser a "roving commission to search for and seize property of the debtor after the sale."[227] Sale by public tender is another example of a sale which does not take place at the same location as the property, since the sealed tenders are delivered to the sheriff's office.

The sheriff then, in order to avoid a trespass action should, if at all possible, remove the goods from the debtor's premises for the actual sale or hold the sale at a location separate from the goods. If neither is convenient, he should obtain the permission of the debtor to hold the sale on his premises. Finally, there is the option of applying to the court for directions under Rule 42 (26) in the event of difficulty as to the location of the sale. The correctness of his decision as to the place is an independent question but the price obtained will be a very weighty factor in determining whether the mode of sale has been correctly selected and whether the sale itself has been properly conducted.

(c) The Price

(i) *Sufficiency*

The duty of the sheriff on this aspect of the writ of seizure and sale is very easy to state but the decisions as to whether that duty has been discharged cover such a broad spectrum of acceptable discrepancy between the assessed value and the price actually obtained that certainty is impossible. The sufficiency of the price is a question of fact in every case. Allowance may be made for the facts that the sheriff sells at a forced sale, for cash[228] and occasionally even for the economic state of the country.[229] Forced sale entails importation in full force of the principle of *caveat emptor*. The sheriff warrants nothing and that obviously may drive down the price.

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[222] *Supra*, note 203.

[223] *Re Purcell*, (1884) 13 L.R. Ir. 489.

[224] *McMaster* v. *McPherson*, (1840) 6 U.C.Q.B. (O.S.) 16; *McGillis* v. *McMartin*, (1843) 1 U.C.Q.B. 145; *Watson* v. *Murray and Co.*, [1955] 2 Q.B. 1.

[225] *Maple Leaf Lumber Co.* v. *Caldbick and Pierce*, (1917) 40 O.L.R. 512 (Ont. C.A.).

[226] *Garner* v. *Lee and Christian*, [1977] 3 W.W.R. 760 (B.C.S.C.).

[227] *Reynolds* v. *Ayers*, (1862) 10 N.B.R. 333 at 337 (S.C.).

[228] *Aldred* v. *Constable*, (1844) 6 Q.B. 370, 115 E.R. 142; *Smith* v. *Colles*, [1871] 2 V.R. 195 (S.C.); *Smith* v. *Bacon*, (1857) 14 U.C.Q.B. 38.

The Alberta Court of Appeal has held that in conducting the sale, the sheriff must exercise the judgment and discretion of a reasonably careful businessman in the circumstances.[230] The High Court of Australia has held that the sheriff is entitled to accept any bid which bears a fair relationship to what is being sold.[231] While the Australian standard might be characterized as slightly less onerous than that which prevails in Alberta, both require the sheriff to have a fairly accurate idea of the market value of the property so he can properly assess the bidding. If the prices bid are not adequate, the sheriff must adjourn the sale and make a return that he has seized goods but that they remain on hand for want of buyers.[232] The same expertise is called for even if he sells by private tender.

If the sheriff adjourns the sale, there may be a divergence in procedure, depending on the court from which process has issued. If the process is a writ of *fieri facias* from Federal Court or the Supreme Court of Canada, the execution creditor may issue a writ of *venditioni exponas* which contains a direction to the sheriff to sell for whatever price he can get. The sheriff is thus relieved of any possible action at the instance of the execution creditor for failing to get an adequate price because the creditor has authorized in advance the accepting of *any* bid.

If on the other hand, the process is from a provincial court, the procedure is less clear. The present Rules of Court contain no writ of *venditioni exponas* even though the definition of a writ of execution in section 42 of the *Court Order Enforcement Act* states that it includes "a writ of seizure and sale . . . and any subsequent writs that may issue for giving effect to it . . . ." A writ of *vend.ex.* is just such a subsequent writ.[233] Nowhere has the writ of *vend.ex.* been expressly abolished. It might be possible, therefore, to mount an argument that the writ still exists, along the lines of reasoning taken by Megarry, J. in *Felton* v. *Callis*,[234] where an application was made for a writ of *ne exeat regno* which had been dropped from the English Rules but which the learned judge found to be still extant, though very hard to obtain.

Such an argument is no concern of the sheriff, however. It rests exclusively with the judgment creditor. A provision which is contained in the present Rules which may be employed at this point instead of *vend.ex.* is Rule 42 (26), the application for directions. Since the Rule is permissive in that the sheriff, the debtor *or* the creditor may apply, some initiative remains with the sheriff though it is not mandatory that he act. Rule 42 (26) is undoubtedly an improvement on the writ of *vend.ex.* as far as the judgment debtor is concerned because it renders it less likely that he will find he has been stripped of valuable property for virtually no return. The only protection a debtor had after issuance of *vend.ex.* was to find a purchaser himself[235] or else pay the judgment. He could so act, however, only if he was aware of the return and the issuance of *vend.ex.* and notice of those stages has never been required in British Columbia.

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[229] In *Cramer* v. *Murphy*, (1887) 20 L.R. Ir. 572 the sheriff, after full advertising and two adjournments of the sale for want of bidders, managed to sell a chattel interest in a farm for £1. In upholding the sale the court took judicial notice of the fact that whether from influence or intimidation bidders for the interests of tenants in farms in Ireland simply did not come forward. *Cramer* was not followed the next year in *Edge* v. *Kavanagh*, (1888) 24 L.R. Ir. 1 when the sheriff sold land valued at £600 for £5 but the sheriff had not been nearly so meticulous as in *Cramer* in advertising and conducting the sale.

[230] *Fair and Co. and Livingston* v. *Wardstrom*, (1919) 47 D.L.R. 16 (Alta. C.A.). In a strong dissent on the requisite standard of conduct for the sheriff, McCarthy J., at 21, stated:

> In my view, it would not be unwise to inform the sheriff's bailiffs of their duties and to give them proper means of ascertaining values and of conducting sales to the best advantage. To hold that the bailiff at Strome acting bona fide and under the advice of his sheriff must know, at his peril, the value say of a prize bull for which a fancy price might be obtained if the value were known, is placing too high a standard of care on him.

[231] *Anderson* v. *Liddell*, (1967-68) 117 C.L.R. 36. "A note on inadequacy of price with respect to the sale of land in (1936-37)" 11 Temple L.Q. 575 states that in Pennsylvania a distinction was drawn between "mere" inadequacy and "gross" inadequacy. The latter was sufficient to have a sale set aside by itself but if the discrepancy constituted "mere" inadequacy then the sale would not be set aside unless the applicant also established that there had been a gross abuse of discretion. Examples given of this element: fraud and collusion, abuse of power, improper lumping of properties in a single sale, mutuality of mistake, errors of description or identification in advertisements and error in the form of the writ.

[232] *Pease* v. *Tudge*, (1915) 19 D.L.R. 158 (Sask. S.C.); *McNichol* v. *McPherson*, (1907) 15 O.L.R. 393 (H.C.); *Keightley* v. *Birch*, (1814) 3 Camp. 521, 170 E.R. 1467.

[233] *Hughes* v. *Rees*, (1838) 4 M. & W. 468, 150 E.R. 1513; *see also* F.J. Hawkins, "What is an Excessive Levy?", *supra*, note 160 at 73.

[234] [1969] 1 Q.B. 200. *See* the comment in J.F. Josling, *Execution of a Judgment* (5th ed. 1974) at 55.

(ii) *Excess*

Just as the sheriff must seize no more goods and chattels than is necessary, so must he sell only sufficient to satisfy the amount endorsed on the writ. He must stop the sale if that amount is obtained and release any remaining goods to the debtor immediately.[236] Failure to stop the sale when sufficient goods have been sold gives rise to an action against him at the instance of the judgment debtor.[237] Whether he has sold too much will be a question of fact in each case.[238] Presumably the sheriff can rectify what proves to be an excessive seizure by a sale in which he sells only a sufficiency, providing that he has not been too far wrong in his initial calculations.

(d) Compliance with Regulations

Whether the sheriff is obligated to obtain a licence to conduct sales generally or to sell particular items is not entirely clear.

The *Trade Licence Act* provided expressly that a sheriff, sheriff's officer or bailiff selling land or goods outside municipal boundaries taken in execution or for the satisfaction of rent or taxes was exempt from the obligation to obtain a business licence but that Act was repealed and replaced in 1980 by the *Business Licence Act*[239] which contains no such exemption. The *Court Order Enforcement Act* in section 106, (4) provides that no auctioneer's licence or tax shall be paid when land is sold but it is silent on the question of sales of goods. An amendment to this section extending the exemption to sales of goods would clarify the situation.

More interesting is the question whether the sheriff must comply with any statutes or regulations governing the sale of particular items. In *Re Bishop and Traders Finance Corp. Ltd.*,[240] the Ontario Court of Appeal refused to approve a statement of the trial judge which indicated that the sheriff, who had seized a tobacco crop, would be bound by regulations of the *Farm Products Marketing Act* and would have to sell through the appropriate marketing Board. In the opinion of the Court of Appeal, if the Legislature had intended that the Board could interfere with the duty of the sheriff to seize and sell under *fieri facias*, express words should have been used. The British Columbia Court of Appeal came to a more moderate, but similar decision in *Roundy* v. *Salinas*.[241] The sheriff in *Roundy* sold certain mineral claims at public auction but the purchaser to whom they were knocked down did not at that point hold a free miner's certificate as required by section 12 of the *Mineral Act* in force then. He acquired one within two days, however, and the sheriff executed a bill of sale to him. A bare majority (3:2) of the Court of Appeal held that the sale to a non-certificate holder was a mere irregularity and that the sale should be upheld. The dissenters took the position that on a proper interpretation of the *Mineral Act* the whole transaction was absolutely void.

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[235] Suggested in *Pease* v. *Tudge*, *supra*, note 232.

[236] *Cook* v. *Palmer*, (1827) 6 B. & C. 739, 108 E.R. 623; *Overn* v. *Strand*, [1931] S.C.R. 720.

[237] *Overn* v. *Strand*, *supra*, n. 236, *Batchelov* v. *Vyse*, (1834) 1 M & Rob. 331, 174 E.R. 113; *Aldred* v. *Constable*, (1844) 6 Q.B. 370, 115 E.R. 142

[238] *Aldred* v. *Constable*, *supra*, note 237, where the sheriff, selling under two writs, was liable because one writ was void as a fraudulent conveyance, though it had not been so determined at the time of the sale.

[239] S.B.C. 1980, c. 3.

[240] [1966] 2 O.R. 343.

[241] (1915) 8 W.W.R. 912.

The question is one of statutory interpretation in each case but both courts exhibited a willingness to find an interpretation which would uphold the sheriff's sale. Obviously, the sheriff should attempt to comply with any such regulations if possible as it is far from clear how other statutes will be interpreted.

(e) Confirming and Setting Aside the Sale - Default by Purchaser

Once the sheriff has accepted the highest bid at a public auction, the sale, if properly conducted, is complete and the sheriff has no power to re-open it even in the face of the possibility of obtaining a higher price.[242] Even if the judgment should be reversed or set aside, the title which has passed is unimpeachable,[243] the theory being that anything less would defeat execution sales altogether.

The question of what the sheriff could and should do if a purchaser defaults was recently reviewed by the New Brunswick Court of Appeal in *Reyes* v. *Saranic*.[244] The case held that the sheriff has a choice. He may bring an action to enforce the contract of sale or he may retain any deposit and resell the property. If a deficiency results, he has the option of suing the defaulting purchaser for the deficiency. He is at no point the agent of the judgment creditor, however, so the decision is his alone. His only obligation is to choose the best way to obtain a reasonable price for the property.

Failure by the sheriff to discharge the duties outlined above will entitle either the judgment debtor or the judgment creditor to bring an action to have the sale set aside (and for damages). However, although the court does have a discretion in the matter and in exercising its discretion will consider the nature and effect of the irregularities complained of, the general response on such applications is to confirm the sale.[245] For sales of land, this judicial inclination has been given the force of law.[246] In the absence of a prescribed procedure for sales of goods and chattels such as that which exists for land, it seems better to leave the courts with the discretion they presently exercise in this matter, rather than to crystallize the discretion in a legislative provision.

(f) Delivery of Goods

Substantively, of course, the sheriff can seize and sell only the interest of the judgment debtor though this fundamental common law rule has been subject to some statutory inroads.[247] The sheriff is under no obligation to warrant the title of the goods he is selling but if he does, he will be liable in the event of a defect.[248] Normally in British Columbia the sheriff expressly sells on an "as is" basis but in the absence of an express statement or notice to that effect, there are no implied warranties. This was confirmed recently in Manitoba when the Court of Queen's Bench in *Shapiro* v. *Banque Canadienne Nationale et al. and Stefanson*[249] refused to award damages against the sheriff when a picture advertised for sale as having been painted by Suzor-Cote turned out not to be authentic.

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[242] *Re Hind*, (1908) 7 W.L.R. 806 (Sask. Q.B. Chambers); *Garner* v. *Lee and Christian*, [1977] 3 W.W.R. 763 (B.C.S.C.). The cases deal with auctions but the same rule must apply also to a private sale.

[243] D.M. Gordon, "Effect of Reversal of Judgment," (1958) 74 L.Q.R. 517 at 526 citing *Mannings Case*, (1607) 8 Co.Rep. 94b at 97a, 77 E.R. 618; *Hoe's Case*, (1599) 5 Co. Rep. 89b; *Goodyere* v. *Ince*, (1610) Cro. Jac. 246, 79 E.R. 211; *Doe d. Emmett* v. *Thorne*, (1813) 1 M. & S. 425, 105 E.R. 159; *Gray* v. *Brignardello*, (1863) 68 U.S. 627 at 634; and *Dickey* v. *Herron*, (1863) 1 Ch. (Ont.) 149.

[244] (1979) 94 D.L.R. (3d) 387 (N.B.C.A.). The case was decided on basic principles because New Brunswick, like British Columbia, lacks legislation giving special directions to the sheriff. *See also Tennent* v. *Robinson*, (1852) 2 I.C.L.R. 142, 4 Ir. Jur. 147.

[245] *Anderson* v. *Liddell*, (1967-68) 117 C.L.R. 36 (H.C. Aust.); *Baker* v. *Dominion Bank*, [1940] 3 W.W.R. 428 (B.C.S.C.); *Lyon* v. *Weldon*, (1824) 2 Bing. 336, 130 E.R. 335; *Inland Trust and Savings Corp. Ltd.* v. *Verreault*, (1979) 32 C.B.R. (2d) 238, (Sask. Q.B.); *Maple Leaf Lumber Co.* v. *Caldbick and Pierce*, (1917) 40 O.L.R. 512 (Ont. C.A.); *McMaster* v. *McPherson*, (1840) 6 U.C.Q.B. (O.S.) 16; *Roundy* v. *Salinas*, *supra*, n. 241. In *Gobeil* v. *Cie H. Fortier*, (1983) 138 D.L.R. (3d) 50 (S.C.C.) Chouinard, J. expressed astonishment that land valued at $18,000 should have been sold for $10 but the Quebec Code of Civil Procedure obligated the sheriff to sell to the last bidder even if only one bidder was in attendance. Thus, the Court found that no jurisdiction existed to set aside the sale in the absence of fraud.

[246] *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 100:

> The purchaser at a sale is not bound to ascertain whether the requirements of this Part have been performed, and notwithstanding a breach of this Part or any impropriety or irregularity in the sale or otherwise of which the purchaser may or may not have notice, if he is not a party to it, the conveyance, when executed by the sheriff and delivered to the purchaser, shall be deemed to be valid.

After sale the sheriff must hand over the goods or at least make them available for delivery.[250] An obligation then rests on the purchaser to remove them within a reasonable time.[251]

5. PAYMENT OVER: THE CREDITOR ASSISTANCE ACT

The common law duty of the sheriff, enforceable by action at the instance of the judgment creditor after demand had been made, was to pay over the money levied after deducting poundage, fees and expenses.[252] Any surplus had to be paid to the judgment debtor.[253] That duty has been considerably modified and new duties have been imposed by the *Creditor Assistance Act*.[254] The duty to pay over after levying continues, of course, but subject to the Act[255] when the process issues from Supreme or County Court.[256] The common law rules as to priority of both execution and payment still obtain for execution issuing from Small Claim Court and may also still apply to process from Federal Court and the Supreme Court of Canada.

In *Re Marten*,[257] however, the Ontario High Court expressed a different opinion. Relying on the definition of execution in the Ontario *Creditors Relief Act*, Catzman, J. held that it embraced all writs having validity in the province and that since the process of the Federal Court ran throughout Canada, a judgment creditor from Federal Court was entitled to share under the Ontario Act—to take the benefit of that Act. Whether a creditor from Federal Court is *obliged* to share the proceeds levied under his writ was not discussed, however, and that is clearly a different question. The federal Crown is always entitled to submit to provincial legislation but "a provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation."[258] The argument that submission for the benefit entails submission as to the burden also was rejected in *Re Marten* on the question of *pro rata* distribution under the Act, the federal Crown being the judgment creditor, so perhaps submission by individual creditors from Federal Court will have equally little bearing on the question of mandatory submission by all creditors.

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[247] *See, e.g., Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373, s. 25 and the discussion in *Dyal Singh* v. *Kenyan Insurance Ltd.*, [1954] A.C. 287 (P.C., Kenya). *See also Associates Finance* v. *Webber and Dixon*, [1972] 4 W.W.R. 131 (B.C.S.C.); *Curtis* v. *Maloney*, [1951] 1 K.B. 736 (C.A.).

[248] *Moritz* v. *Christopherson*, (1911) 18 W.L.R. 63 (Sask. K.B.); *Mink* v. *Jarvis*, (1852) 13 U.C.Q.B. 84; *Ex Parte Villars*, (1874) L.R. 9 Ch. App. 432.

[249] (1981) 123 D.L.R. (3d) 630 (Man. Q.B.); *see also Reyes* v. *Saranic*, (1979) 94 D.L.R. (3d) 387 (N.B.C.A.).

[250] *R.* v. *Campbell*, (1893) 14 N.S.W.L.R. 532 (S.C.).

[251] *In Re Benn Davis: ex parte Pollen Trustees*, (1886) 55 L.J.Q.B. 217; *Duncan* v. *Garratt*, (1824) 1 C. & P. 169, 171 E.R. 1148.

[252] *Botten* v. *Tomlinson*, (1847) 16 L.J.C.P. 138; *Coburn* v. *McRobbie*, (1893) 9 Man. R. 375 (Q.B.); *Dale* v. *Birch*, 3 Camp. 347, 170 E.R. 1406; *Jefferies* v. *Sheppard*, (1820) 3 B. & Ald. 696, 106 E.R. 815.

[253] *Ainslie* v. *Rapelje*, (1847) 3 U.C.Q.B. 275; *In Re Hogg and Christie*, (1901) 19 N.Z.L.R. 856 (S.C.).

[254] R.S.B.C. 1979, c. 80. *See* Law Reform Commission of British Columbia, Report on Creditor's Relief Legislation (LRC 42, 1979).

[255] Section 31.

[256] Section 47.

[257] (1982) 130 D.L.R. (3d) 607 (Ont. H.C.J., Div. Ct.).

[258] *H.M. in Right of Alberta* v. *C.T.C.*, (1977) 75 D.L.R. (3d) 257 at 265, [1978] 1 S.C.R. 61 at 72 (*per* Laskin, C.J.C.).

The Alberta Court of Appeal has held that where the sheriff wrongfully distributes under the *Creditor Assistance Act* money which does not fall within the scope of the legislation, the creditors who have improperly shared may be ordered to repay the money.[259] Whether the sheriff would be liable to an action was not discussed.

Where the *Creditor Assistance Act* applies, the sheriff must make an entry in a book open to public inspection of every levy.[260] A levy consists either of the amount recovered on the execution sale or of a payment to the sheriff resulting from seizure.[261] Time is calculated from the date of this entry in monthly increments and at the end of each month the sheriff must distribute the money on hand from the first levy and all subsequent levies within the month to all those judgment creditors who have placed writs of seizure and sale in his hands and to all those other creditors who have obtained certificates under the Act and delivered them to him.[262]

Two particular sections of the Act are noteworthy in that they add significantly to the property available to the sheriff under a writ of seizure and sale and yet they remain under-used.

Section 26 empowers the sheriff, though it does not oblige him, to make an application for payment over of any fund in court belonging to the judgment debtor or such part thereof as will satisfy claims in his hands. This section is the equivalent for the sheriff of the equitable charging order which constitutes the only other way in British Columbia for a judgment creditor to obtain money *in custodia legis*. Money apparently is to be paid over immediately under section 26 but once in the sheriff's hands is to be retained until the end of the month. It is surprising that the section remains under-used since the procedure on the equitable charging order has now been brought into line with that prescribed in the *Judgments Act, 1838* for charging orders on shares and government stock, funds and annuities; namely, a six month waiting period followed by rateable distribution to applicants.[263] Since fewer creditors are likely to collect in one month than in six, it would appear to be in the interest of creditors to inform the sheriff of any fund in court of which they gain knowledge so that he can make an application under section 26 or to make an application themselves as permitted by the section. The only condition for invoking the section seems to be the existence of a discrepancy between the money already levied and the total amount of claims thus, inferentially, requiring the sheriff to have received writs for execution and/or certificates under the Act.

The second noteworthy provision, section 34, contains a slightly different condition for its invocation: where there are several executions and claims and there do not appear to be sufficient goods the sheriff, or a person entitled to distribution,[264] may use the process of garnishment to attach debts. The difference is that in section 26 there is no requirement that the goods be exhausted or even that goods have been seized before application may be made to the court for payment out to the sheriff of the fund *in custodia* whereas section 34 seems to require the equivalent of a *nulla bona* return as a precondition for its use.

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[259] *Terminal Grain Co.* v. *Soderburg*, [1925] 1 W.W.R. 9 (Alta. C.A.).

[260] Section 2.

[261] *Benjamin Moore & Co. Ltd.* v *Finnie*. [1954] O.W.N. 772, [1955] 1 D.L.R. 557 (Co. Ct.). *But see* text accompanying note 265 *infra*.

[262] Section 3. The conditions under which and the procedure for obtaining certificates are to be found in sections 6-22 of the *Creditor Assistance Act*. A decision of the B.C.S.C., *North Arm Transportation* v. *Derrick Lake Contractors*, (1979) 14 B.C.L.R. 399, suggests that there may be a duty on the sheriff to inform creditors who contact him about the procedure under the Act for obtaining a certificate.

[263] *Chima* v. *Haydak*, [1976] 6 W.W.R. 546 (B.C. Co. Ct.); *Rennison* v. *Sieg*, (1979) 10 B.C.L.R. P-30 (B.C.S.C.).

[264] Section 34 (2).

A survey of the sheriffs completed in the mid-1970's revealed that there are three main reasons for the under-use of these sections. First, lack of information about the existence of a fund in court or of debts; second, lack of understanding on the part of sheriffs about when such funds in court belong to the judgment debtor; and third, an apparent lack of understanding by court officials and the Attorney General's Department as to the existence and operation of these sections when attempts were made by sheriffs to use them.

In addition to the obligation to keep a record of all levies, the sheriff is by section 33 directed to answer all reasonable inquiries by creditors about the debtor's estate and to facilitate the obtention by the creditor of full information about the debtor's estate and the creditor's likely share.

There are two major exceptions to the sheriff's duty to enter every levy and hold the proceeds for distribution. Section 4 straightforwardly provides that if there are any interpleader proceedings concerning property seized, the money realized shall be distributed only to those creditors who contested the adverse claim. Since section 4 (3) empowers the court to allow a reasonable time to other creditors to contest, this may not be much of an exception.

The second excepting provision, section 23, is considerably more perplexing as it seems to undercut the main purpose of the Act and to throw into confusion the plain duty of the sheriff imposed by section 2:

> 23. (1) A notice under section 2 shall not be entered where, without a sale by the sheriff, all executions and claims in the sheriff's hands are withdrawn or paid in full, and no other claim has been filed with the district registrar.
>
> (2) Where a debtor without a sale by the sheriff pays the sheriff part of the amount owing on an execution or claim in the sheriff's hands, and there is at the time no other execution or claim in the sheriff's hands, the sheriff shall apply the same on the execution or claim in his hands, and section 2 does not apply to the money so received by the sheriff.

Subsection (1) is difficult to understand without reference to the legislation as it stood before the 1979 consolidation. The section (then section 20 1)) provided that if the debtor paid the full amount to the sheriff before sale (but apparently after seizure) and the sheriff at that time had no other writs or claims in his hands or else all other claims had been withdrawn, the sheriff should pay the creditor in full and make no entry in the book.[265] A similar exception was made (in section 20 (3)) for part payment without sale when there are no other writs or claims in the sheriff's hands and this exception has survived intact as section 23 (2). The conclusion must be that, in spite of its present drafting defects, the sheriff need not make an entry under section 2 *unless* he has levied the money by way of an execution sale. There then is still a reward for the first judgment creditor who has a more solvent or cooperative debtor as he is not required to share the proceeds and a reward for the sheriff who need not worry about the obligation to record and distribute monies under the *Creditor Assistance Act*.

If the exceptions are not applicable, however, (or are disregarded) the sheriff is under a duty to distribute the money levied in accordance with the Act. If there is insufficient proceeds to pay everyone in full, the sheriff may simply distribute *pro rata*, giving priority to those claimants employed by the debtor for up to three months' wages,[266] or he may prepare a plan of payment to be approved by the debtor and all the creditors.[267] The Act gives complete discretion to the sheriff on this point. If there are creditors claiming priorities, typically Crown liens, such a plan of distribution is usually drawn up and the sheriff must struggle with the difficult questions of interpretation of various statutory priorities.

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[265] Consolidation in 1979 produced other strange changes in this Act: the primary purpose of the Act is now to be found in section 47 instead of section 3; section 5 of the Act directs the sheriff to distribute in accordance with the provisions of a section which deals with interpleader, not distribution.

[266] Section 36 (1).

[267] Section 38.

6. RETURNS

Watson states:[268]

> Returns are nothing else but the sheriffs' answers, touching that which they are commanded to do by the king's writ, and are but to ascertain the court of the truth of the matter; and yet this is one of the most difficult things belonging to the office. . . .

Perhaps because the return was "one of the most difficult things belonging to the office," this is the one area of sheriff law in which for over a century in England there has been a discrepancy between the letter of the law and actual practice. The letter of the law imposes a duty on the sheriff to make his return to the court immediately following payment over to the creditor. The practice for decades has been to make no return unless ordered to do so but to make a return to the solicitor of the judgment creditor.

Originally, when the writ was issued, a day was set for its return and the sheriff was obliged to file his return in court on that day. Now the direction is to return the writ "immediately" after execution and "immediately" has been taken to mean within a reasonable time.[269] Failure to make a return (and an insufficient or a false return amounted to failure[270]) on the day certain, when that was the direction, resulted in the sheriff being liable to attachment proceedings for contempt of court.

The duty became less onerous when the courts required a return only when the judgment creditor or the judgment debtor[271] obtained an order to that effect and later, after notice had been given. Failure to return after being so ordered, and only after, still amounted to punishable contempt.[272]

Ordering the sheriff to return or giving him notice to return under later rules was a valuable technique for ensuring that the sheriff was performing his duties under the writ both with the due diligence required and with correct judgment. For example, if the sheriff had failed to seize goods which he might have seized either because he had been too slow or because he had come to an incorrect conclusion as to ownership and made a return of *nulla bona*, the judgment creditor could bring an action for a false return and, if successful, collect damages from the sheriff equal to the value of the goods he should have levied upon.

There is a large body of case law concerning the sufficiency of a return[273] but it is the primary question of the existence of an obligation to make a return that seems to be of more significance in British Columbia. The present state of law and practice in British Columbia is that the obligation on the sheriff to make a return not only is extant but also is discharged in practice (though perhaps not with the particularity the old cases required). But the procedure whereby the solicitor could enforce that obligation has vanished from the Rules. The obligation is found in the direction to the sheriff contained in Form

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[268] W.H. Watson, *The Office of Sheriff* (1848) at 87.

[269] *Snowball* v. *Dixon*, (1841) 4 Y. & C. Ex. 511, 160 E.R. 1109.

[270] Watson, *supra*, note 268 at 99.

[271] *Coleman* v. *Dunlap*, (1868) 7 N.S.R. 216 (S.C.); *France* v. *Clarkson*, (1834) 2 Dowl. 532.

[272] *Moreland* v. *Leigh*, (1816) 1 Stark. 388, 171 E.R. 506; *Woodman* v. *Gist*, (1837) 8 C. & P. 213, 173 E.R. 465; *R.* v. *Moodie*, (1844) 1 U.C.Q.B. 410.

[273] For rules as to the content *see* Watson, *supra*, note 268 at 87-99; C. Churchill, *The Office and Duties of the Sheriff* (1882) at 342-48. One rule, for example, requires that on a return of goods unsold for want of buyers, the sheriff must include a statement of the value of the goods seized: *Barton* v. *Gill*, (1843) 13 L.J. Ex. 83, 152 E.R. 1219; *Wintle* v. *Lord Chetwynd*, (1839) 7 Dowl. P.C. 554.

42.[274] The wording is somewhat changed in Form 42 from the old writ of *fieri facias* but the substance seems to be identical. The writ of *fieri facias* provided:

> And in what manner you shall have executed this Our writ make appear to Us in Our said Court immediately after execution thereof. And have there then this writ.

Form 42, on the other hand, uses less majesterial language:

> After carrying out the above instructions you shall pay to the person specified . . . from the amount realized the sum or sums that are payable to him and account therefor by return to the Court.

A literal interpretation could possibly narrow Form 42 to a duty to return only when there has been some satisfaction in contrast to the writ of *fieri facias* which directs a return of whatever manner the writ has been executed. Nevertheless, the direction in the modern form appears to be interpreted in the spirit of the ancient form in practice and it would be unusual for a change in the wording to have been intended to change the law. The only intention, as in the case of the direction to sell, appears to have been modernization by simplification.

The absence of a procedure to enforce the duty is puzzling. The 1961 Rules contained 0.52 r. 11, identical to the English 0.52 r. 11.[275]

> No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solicitor), or by his solicitor, calling upon the Sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such Sheriff.

The Appendices to the 1961 Rules contained no notice form but reference to the English Annual Practice or Lord Atkins Forms and Precedents, or Chitty's Forms provides the appropriate form of notice. In England, the time allowed the sheriff to comply with the notice was four days in London and Middlesex and eight days elsewhere. Ontario allows eight days.[276] What period was allowed in British Columbia is unclear in the absence of any form.

The common law method of forcing the sheriff to report on his progress which was by obtaining a court order ruling the sheriff to return, was apparently abolished by O.52 r. 11 which substituted a new procedure: notice. The state of the law in British Columbia is now quite uncertain.Has the omission of the notice procedure from the 1976 Rules repealed O. 52 r. 11? If it has, then the common law procedure only revives if it was in force in 1976 and it was not in force if it had been replaced by the notice procedure.[277]

The first issue is whether 0.52 r. 11 is still in force. It certainly is not reproduced in the 1976 Rules but neither is there inclusion of any equivalent section. The concordance to the Rules simply states that it was omitted. In neither the *Court Rules Act*,[278] nor the Rules themselves is there any statement that the 1961 Rules are repealed or that the 1976 Rules constitute a complete code of procedure.The ordinary rules of statutory interpretation tell us that statutes continue in force until repealed either expressly or by necessary inference.[279] Therefore, it is reasonable to assume that it is still possible in British Columbia for an execution creditor to give notice to the sheriff to return the writ and to apply for a committal order if he fails to comply.

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[274] *See* also Form J of the Rules of the Supreme Court of Canada and Form 56 of the Federal Court Rules.

[275] Replaced in 1965 by O. 46 r. 9.

[276] Rule 554.

[277] *See Interpretation Act*, R.S.B.C. 1979, c. 206, s. 35 (a). The Rules of Court in B.C. have always had the force of law: J.W. Horn, "Statutory Force of the Rules of Court" (1978) 36 The Advocate 223; *Robitaille* v. *Vancouver Hockey Club*, (1981) 114 D.L.R. (3d) 568 (B.C.C.A.).

[278] R.S.B.C. 1979, c. 77.

[279] *See* note 277, *supra*. *See also* the reasoning in *Felton* v. *Callis*, *supra*, note 234, and accompanying text.

If, on the other hand, 0.52 r. 11 is no longer extant, then there is no procedure existing in British Columbia for compelling a return. But, since the substantive duties of the sheriff still exist and since the sheriff is an officer of the court, an alternative argument can be made that the court has the inherent power to control its officers by *devising* a method.[280]

Although it is undesirable to add unnecessarily to the duties of the sheriff, especially by burdening him with premature requests to report, it has always been considered necessary to give the execution creditor a formal and mandatory process for ensuring that the sheriff is properly discharging his duties. This is the main function of the return. Therefore, a reintroduction of notice to return perhaps modified by prescribing a minimum period within which the sheriff is immune from notice in order to protect him from vexatious notices, might be considered. He is not totally immune from such notice anyway as the Federal Court Rules provide for it.[281]

F. Execution Against Land

In British Columbia the sheriff has no duties in respect to execution against land until the judgment creditor decides that the land should be sold. By the time the sheriff is directed to sell, an inquiry has been made by a district registrar ascertaining exactly what the interest of the debtor is in the property and what charges are on the title, thereby eliminating one of the recurring problems for the sheriff in the sale of land, namely, certainty as to the interest sold. Uncertainty deters buyers and lowers the price and misdescription may result in an action being brought against the sheriff.

The *Court Order Enforcement Act* provides a procedure on sale by the sheriff which is a mixture of common law rules and new rules. He may not sell for at least one month after the order for sale has been delivered[282] and within that period he must advertise in the Gazette and include in that advertisement a number of listed particulars.[283] Then for the seven days immediately preceding the sale, he must similarly advertise in a local newspaper of general circulation and must post a suitably framed notice of the sale in his own office.[284] These latter advertising requirements can be modified in the discretion of the court.

The statute directs that land be sold by public auction and so changes the common law, but there are no directions as to the time of or place where the auction may be held so presumably the common law governs these two aspects.[285] The statute also requires the sheriff to conduct the sale personally,[286] a direction again inconsistent with the common law.

The common law power of adjourning the sale is reproduced in the *Court Order Enforcement Act*; if there are no bidders or insufficient bids, the sheriff should adjourn but he may not re-open after accepting a bid.[287] The common law duty to ensure that an adequate price is obtained applies equally to a sale of land as to a sale of goods and chattels.[288] The common law rule that execution sales must be for cash and not on credit also applies.

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[280] *See* Bouck, J. in *Lavaris* v. *MacMillan Bloedel Ltd.*, (1977) 3 B.C.L.R. 308 at 318 and Horn, *supra*, note 277.

[281] Rule 2008. *Hazley* v. *McArthur*, (1897) 11 Man. R. 602 (Q.B.) held that a failure on the part of the execution creditor to make any inquiries as to what had been done under a writ he had delivered to the sheriff permitted an inference to be drawn that the writ had not been delivered for execution. Thus priority was lost. The sheriff had held the writ for two years so the creditor was admittedly somewhat unconcerned. Conversely, the sheriff was surely negligent in not seizing in that period.

[282] Section 93.

[283] Section 94 (1).

[284] Section 94 (2).

[285] *See* text accompanying note 210-212 and note 223-227, *supra*.

[286] No auctioneer's licence is required: *Court Order Enforcement Act* 106 (4).

[287] *See* text accompanying note 242-243, *supra*.

Though the statute directs sale by public auction personally conducted by the sheriff in the usual case, there is no reason for the sheriff not to apply for directions under R. 42 (26) if, for example, in his opinion a private sale might be preferable.[289]

The sheriff must execute a conveyance of the land sold in the proper form[290] which, notwithstanding any irregularities, is deemed to be a valid conveyance.[291] The final duty of the sheriff in respect to the sale of land in British Columbia is to deduct his fees and expenses and pay the money to the registrar of the court where the order for sale was made.[292] It is then the duty of the registrar to distribute it in accordance with the *Creditor Assistance Act*.[293]

A continuing duty of the sheriff is to keep a register of all sales.[294] This is not a heavy responsibility because execution sales of land have become a rarity in British Columbia.

G. The Duties of the Sheriff on Bankruptcy

The *Bankruptcy Act*[295] states very clearly the present law as it affects the sheriff's role in the execution process. Section 50 (1) provides that receiving orders and assignments made under the Act take priority[296] and section 51 (2) directs the sheriff to deliver over to the trustee all the property of the bankrupt in his hands. If he has already sold the property, he must deliver the proceeds to the trustee.[297]

H. Other Writs and Orders

Rule 42 and the Federal Court Rules provide for writs of execution other than the writ of seizure and sale and these writs are also directed to the sheriff. The duties of the sheriff under these writs are generally simpler. He has fewer and narrower functions to perform and therefore less scope for the exercise of discretion which has frequently caused problems in executing writs of seizure and sale.

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[288] *Anderson* v. *Liddell*, (1967-68) 117 C.L.R. 36 (H.C. Aust.)

[289] W.R. Murray, "Judicial Sale and Power of Sale" Law Society of Upper Canada Special Lectures 1970, 23 at 40 lists five situations in which a court might be persuaded to sanction a private sale or sale by tender in a foreclosure action:

(1) Where commercial and particularly large commercial properties are sold, tender allows a more flexible approach and frequently results in a more favourable sale.

(2) Unique quality of property and limited market with perhaps large amount of information to be given as to revenue aspects of property where offers received may vary in certain particulars—tenders (*Rutland Rly.* v. *Béique*, 37 S.C.R. 303).

(3) Where evidence is introduced that market has been thoroughly explored and prospective purchasers wish to tender in private and not openly bid—tenders.

(4) Where market has been explored and only one purchaser is interested and evidence is introduced as to value of property and market—private contract.

(5) Where all parties agree to a form of sale be it private contract or otherwise.

The article concerns foreclosure sales but the reasons may be equally valid for execution sales.

[290] *Court Order Enforcement Act*, Form C, Schedule 3.

[291] Section 100.

[292] Section 99. Crawford, Empirical Study, *supra*, note 24, discovered that there was a difference of opinion between sheriff and registrar as to the meaning of the phrase "incidental expenses" in this section. The sheriffs and Crawford considered it to refer to the incidental expenses of sale, whereas the registrar considered that it referred to encumbrances on the title. This difference of opinion was causing some problems. Considering the phrase in context and in light of the sheriff's common law duty, the phrase must refer to sale expenses but clarification by the legislature would prevent further problems. Mr. Turriff, one of the present district registrars at Vancouver, does not share the opinion of his predecessor.

[293] Section 104. *See Hankin Furniture Industries Ltd.* v. *Gill*, (1979) 16 B.C.L.R. 311, 14 C.P.C. 177 (B.C.S.C.).

[294] Section 107.

[295] R.S.C. 1970 c. B-3.

[296] 50. (1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

> (2) Notwithstanding subsection (1), one solicitor's bill of costs, including sheriff's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against the property of the bankrupt.

[297] *Hudson* v. *Brisebois Bros. Construction Ltd.*, (1982) 19 Alta. L.R. (2d) 276 (Alta. C.A.).

Though the sheriff had duties under other common law writs which are possibly revivable,[298] discussion will be limited to those provided for in the Rules.

1. WRIT OF SEQUESTRATION

No sheriff text contains a discussion of this writ because, historically a form of equitable relief, it was traditionally directed to four sequestrators of whom the sheriff was not one. In British Columbia the writ is directed to the sheriff.[299]

Rule 42 (2) authorizes enforcement by sequestration of an order to pay money into court and Rule 42 (4) makes sequestration available if the order was for delivery of property other than money or land. Neither rule makes any mention of a time limit for compliance with either order which the predecessor in the 1961 Rules, 0.53 r. 6, required as does the English writ. Sequestration has always been a process in the nature of contempt and so required for its invocation the doing of an act within a specified time. That qualification is now omitted, but the writ may be issued only with leave of the registrar on proof that the order has not been complied with.[300] Whether the English law concerning availability and issue of the writ is completely applicable in British Columbia is outside the scope of this study.

Though its availability is far more restricted than that of a writ of seizure and sale, the property subject to the writ is far more diverse since virtually all real and personal property including choses in action are covered. Should the writ ever be used with any regularity in British Columbia, the sheriff would have to be provided with information as to property subject to sequestration.[301]

The duties of the sheriff under the writ are to enter upon and take possession of all the real and personal estate of the execution debtor, to receive the rents and profits and to so continue until the debtor has complied with the order and paid the costs, fees and expenses of the execution. There is no power of sale under this writ, though application may be made to the court for an order for sale or, indeed, for any directions as to the management of the property.

In executing a writ of sequestration the sheriff has power to break the outer door as well as inner doors and containers.[302] Entry and sequestration of the property must be carried out "immediately" on delivery of the writ but "immediately" again means within a reasonable time.[303]

The same care as exists under a writ of seizure and sale must be taken to ensure that it is the property of the judgment debtor which is being entered upon and sequestered because there is the same liability to action for trespass under sequestration as under seizure and sale. Furthermore, the sheriff is entitled to no more direction from the execution creditor on sequestration than on seizure and sale but must exercise his own judgment in identifying the property.

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[298] *See* discussion concerning the writ of *venditioni: exponas, supra*, text at note 233.

[299] The Federal Court writ is still directed to four sequestrators, *see* form 59.

[300] Rule 42 (12).

[301] *See, e.g.*, 2 *Williams's Supreme Court Practice* (Victoria) (2d ed. 1973) at 2099.

[302] *Harvey* v. *Harvey*, (1884) 26 Ch. D. 644.

[303] *Payne* v. *Drewe*, (1804) 4 East. 523, 102 E.R. 931.

The obligation is to segregate and manage the property until the order has been obeyed. This is obviously an obligation of a continuing nature which cannot be discharged by simply entering into a walking possession arrangement and then returning to collect and sell.

In one respect, the sheriff is probably in a better position than the four sequestrators as he should be able to exercise his common law power to call for aid in the execution of the writ.[304]

The words of Rule 48 (2) (a) appear to be wide enough to allow the sheriff to interplead if sequestered property is claimed by a stranger, though English practice says it is not available.[305] As an officer of the court, the sheriff will be protected from interference by anyone in executing this writ by the contempt powers of the court.

The writ itself directs no return. When the order has been obeyed, the "contemnor" must apply for an order for the dissolution of the sequestration.[306]

2. WRIT OF POSSESSION

The duty of the sheriff in executing a writ of possession, available both from provincial courts[307] and from Federal Court,[308] is to enter on the specified land and to deliver vacant, quiet possession. The rentalsman may also make an order for possession under the *Residential Tenancy Act*,[309] which has the same force and effect on filing in the appropriate court as the judicial process[310] and therefore imposes the same rights and duties on the sheriff.

There are no restrictions on the sheriff's powers of entry in executing this writ: he may break and enter.[311] It is the obligation of the person who causes the writ to issue to accompany the sheriff and point out the property, an obligation which reduces but does not necessarily eliminate the possibility of trespass actions against the sheriff.[312] The fact that an obligation to direct the sheriff rests on the party issuing the writ does not convert the sheriff into his agent.[313] The sheriff remains an officer of the court. If he delivers land other than that named in the writ, the sheriff will be liable to an action for trespass.

Delivery of the writ gives rise to the usual duty to execute within a reasonable time. No precise measure can be stated but unreasonable delay gives rise to an action for damages.[314] Complaints concerning time issues under writs of possession indicate that such writs may be enforced too expeditiously if anything. Eviction orders under the *Residential Tenancy Act* are appealable for fifteen days by section 55 (6). On application for review, the Rentalsman's order is stayed by section 55 (4) but in the interim, an order for possession may have been delivered to the sheriff for execution. It is clearly his duty to execute a valid order immediately; he is not entitled to grant indulgences of delay. Complaints, therefore, should be directed at the legislation, rather than the sheriff. The solution may be to introduce a mandatory period before which the writ or order may not be executed, thereby allowing the tenant time to apply for review before the order is executed.

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[304] *See* text accompanying note 148-155, *supra*.

[305] J.F. Josling, *Execution of a Judgment* (5th ed. 1974) at 91; Lord Atkin, *Encyclopaedia of Court Forms and Precedents in Civil Proceedings* (1948) vol. 9 at 131.

[306] Atkin, *supra*, note 305.

[307] Rule 42 (3).

[308] Rule 1901.

[309] R.S.B.C. 1979, c. 365.

[310] Section 78, *Residential Tenancy Act*.

[311] *Semayne's Case*, (1604) 5 Co. Rep. 91a, 77 E.R. 194.

[312] *Floyd* v. *Bethill*, (1617) 2 Roll. Abr. 459.

[313] *Williams* v. *Williams*, [1937] 2 All E.R. 559 (C.A.)

[314] *Mason* v. *Paynter*, (1841) 1 Q.B. 974, 113 E.R. 1406. In this case the measure of damages was the expense incurred by the plaintiffs' attempt to get the writ executed by someone other than the sheriff. *See* text accompanying notes 70-82, *supra*.

The British Columbia Supreme Court has held that vacant possession means a physical absence of both persons, and goods and chattels. Thus the obligation of the sheriff is to remove everything from the property. However, the sheriff must exercise care in his removal of the goods. If the sheriff is less than meticulous in the execution of the writ, he might be liable to the execution defendant in negligence.[315] It is not a safe practice, therefore, simply to remove goods from the house to the street as damage may occur either to the goods or to third parties.

If possession is interfered with before execution is completed by delivery, the sheriff will have to perform the operation again.[316] Such interference may also constitute a contempt and the sheriff may have to execute an order of committal.[317] In executing the writ, the sheriff has the common law power of calling for assistance and it is not unusual for him to ask for the attendance of a police constable.[318]

The sheriff enjoys the protection of the writ when executing so even if the judgment is later set aside, he is immune from action.[319]

The present writ contains no direction to the sheriff to return although such a direction was contained in the 1961 version. No duty to return apparently exists.

Execution of a writ of possession is complete when the sheriff has delivered possession and departed. Delivery is constituted by handing over some part of the property such as a key, a twig or some dirt.[320]

Failure to execute within a reasonable time or negligence in executing will subject the sheriff to a damage action at the instance of the injured party. The sheriff has the right to ask for an indemnity before executing, but in the event of a refusal, he must discharge his duty unprotected.[321]

3. WRIT OF DELIVERY

In British Columbia a writ of delivery is available after an action in detinue or for breach of a contract to deliver specific goods and it may be one of two kinds: an order for specific delivery or an order for delivery of goods or their assessed value.[322]

The sheriff must execute a writ of delivery immediately in the same sense as that term is used concerning other writs of execution[323] and failure to execute will incur the same liability. Entry must be accomplished without a breaking. The particular goods must be seized; seizure of the wrong goods will constitute a trespass.

Under a writ of specific delivery, failure to find the goods entitles the sheriff to take possession of all the defendant's lands and goods and chattels until he produces the chattel which the sheriff has been directed to deliver or, if the judgment holder prefers, until the sheriff realizes from the other property the value of the specific property.[324]

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[315] *Rogerson* v. *Wilkinson et al. and Fernwood Movers and Storage*, [1973] 2 W.W.R. 350 (B.C.S.C.).

[316] *Alliance Building Society* v. *Austen*, [1951] 2 All E.R. 1068.

[317] Rule 56 (5); *see* discussion *infra*.

[318] *See*, *e.g.*, *Rogerson*, *supra*, note 315.

[319] *Williams* v. *Williams*, *supra*, note 313 and *see* text accompanying note 368.

[320] C. Churchill, *Law of the Sheriff* (1882) at 410.

[321] But *see* text accompanying note 359 ff. *infra*.

[322] R. 42 (18) and Forms 45 and 46. The predecessor of this Rule was punctuated far more effectively and made it quite clear that there were two kinds of writs of delivery. Judicious insertion of a semi-colon in Rule 42 (18) immediately following the word "property" in line 8 would make clear at once the import of the section.

[323] *See* text accompanying notes 70-82, *supra*.

[324] Rule 42 (18).

If the writ is for delivery of the goods or their assessed value and they cannot be found, the sheriff must levy the assessed value from the other goods and chattels of the execution defendant.

Neither writ of delivery in the 1976 Rules requires the sheriff to make a return.

The writ is complete protection for the sheriff regardless of the ultimate status of the judgment so long, of course, as he does only what it directs him to do.[325]

4. COMMITTAL

Imprisonment for debt (except as permitted expressly by statute) was abolished on the mainland of British Columbia in 1865 and in 1885 this abolition was extended throughout the Province.[326] Until 1976 the exceptions were to be found in the *County Courts Acts*[327] and the *Arrest and Imprisonment for Debt Act*.[328] Both statutes authorized examination of the judgment debtor by the execution creditor and provided that various failures to cooperate on the part of the debtor would constitute contempt punishable by imprisonment. The punishable lack of cooperation could be something as slight as mere failure to appear or more culpable acts such as disposing of property fraudulently. The judgment summons procedure under the *County Court Act* permitted imprisonment for up to twenty days, but under the *Arrest and Imprisonment for Debt Act* a debtor could be imprisoned for up to twelve months with or without hard labour. It was not uncommon in fact for debtors to spend a considerable time in jail for failing to appear when the only reason for not appearing was that since they could not pay, they considered appearance useless.

In 1976 the separate procedures were incorporated into the Rules of Court. Rule 42 (27)-(48) governs what is now known as subpoena to debtor. The maximum possible term is now forty days but the acts or omissions on the part of the debtor which constitute the contempt remain substantially the same. A committal order may be executed either by a sheriff or by any peace officer but, at least in the Vancouver district, it is the sheriff who executes committal orders.

Form 50 directs the sheriff to arrest the judgment debtor, to bring him "forthwith" before the Court and then to deliver him to prison if the Court makes no order to the contrary. In practice this is being interpreted as an absolute three stage procedure. No one is ever taken to prison *before* a court appearance. "Forthwith" is taken to mean "immediately" so the sheriff arrests only on the days and at the time of day when he can take the person arrested directly to the court. The result of this narrow construction is that there is often considerable delay in the execution of committal orders but the order is valid for one year and the sheriff is under no duty to arrest immediately, only within a reasonable time.

The direction in Form 50 is clearly amenable to this interpretation but a consideration of the evil aimed at and the object of the present direction induces doubt that the procedure followed was the procedure necessarily intended. The problem of debtors languishing in jail without having had a hearing to consider whether they really deserved to be there was what engendered the direction in Form 50. The remedy was to direct that they be taken "forthwith" before a court. "Forthwith" in the context of the execution process simply means within a reasonable time.[329] The intention was only that the debtor should be given a hearing within a reasonable time of his arrest. This protection is in addition to that given to him by Rule 42 (44) which permits an application to the court to set aside or vary the order. If the bottleneck resulting from the narrow interpretation of the direction in Form 50 is considered a problem which should be eliminated, the best method would be to redraft the Rules.

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[325] *See* text accompanying note 368 ff. *infra*.

[326] C.S.B.C. 1888, c. 42, s. 8. *See* C.S.B.C. 1877, c. 62, s. 1; S.B.C. 1885, c. 8, s. 1.

[327] R.S.B.C. 1960, c. 81, ss. 147-160.

[328] R.S.B.C. 1960, c. 17, s. 15 and s. 19.

A common law gloss must be added to the express directions in the Rules. In arresting for contempt the sheriff is empowered to break outer doors after giving due notice.[330] Failure on the part of the sheriff to execute the commital order will itself be a contempt rendering the sheriff punishable.[331] By analogy with the cases on the duty of the sheriff in executing writs of *capias ad satisfaciendum* and *capias ad respondendum* it seems that the judgment creditor is under no obligation to assist the sheriff in any way in locating or identifying the person named in the order.[332]

5. RECEIVERSHIP

Section 36 of the *Law and Equity Act* provides that a receiver may be appointed in "all cases in which it appears to the Court or a Judge to be just and convenient." Rule 42 (5) also provides that an order may be enforced by the appointment of a receiver. The circumstances in which a court may use the power granted by these provisions and appoint a receiver as a form of equitable execution are beyond the scope of this study. The relevance of receivership to the sheriff is that the sheriff is always an eligible person for appointment by the court and has sometimes actually been named receiver.[333] A brief outline of the duties of a receiver may thus be useful though it is not anticipated that the sheriff will often be so named.

The primary duty of a receiver is a continuing one. He is to receive the rents and profits of real estate and to collect personalty. His secondary duty is to present his accounts to the court on a regular basis. The Rules in British Columbia provide that accounts shall be filed annually unless the court orders otherwise.[334]

It is a matter of some conjecture in British Columbia whether a receiver can be given powers of sale. Older English and Canadian cases from other provinces expressed opinions ranging from some doubt to an emphatic negative[335] but in the recent British Columbia Supreme Court case of *Vancouver A. & W. Drive Ins Ltd.* v. *Komarnisky*,[336] Fulton, J. directed the receiver he appointed to have a power of sale. Since the issue was not discussed in the reasons for judgment, however, it is probably not safe to assume that a receiver can be given powers of sale.

If the sheriff should ever be appointed receiver, any money collected by him must be paid over directly to the judgment creditor and not held for distribution under the *Creditor Assistance Act*. Receivership is not, strictly speaking, execution. It is equitable relief. Thus money received is not money levied "on an execution" within the meaning of section 2 of the *Creditor Assistance Act*.[337]

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[329] *See* note 70, *supra*.

[330] *Burdett* v. *Abbott*, (1811) 14 East. 1, 104 E.R. 501; *Re Freston*, (1883) 11 Q.B.D. 545, 45 E.R. 1016; *Harvey* v. *Harvey*, (1884) 26 Ch. D. 644.

[331] *Harvey* v. *Harvey*, *supra*, note 330; *see also* note 347 *infra*.

[332] *Dyke* v. *Duke*, (1838) 4 Bing. N.C. 197, 132 E.R. 764.

[333] *Herold* v. *Budding*, (1916) 37 O.L.R. 605 (H.C.); *Sayre* v. *Gilfoy*, [1925] 1 W.W.R. 992 (Alta. C.A.).

[334] Rule 47 (4).

[335] *Goodbun* v. *Mitchell*, [1929] 3 W.W.R. 622 (Man. C.A.); *Herold* v. *Budding*, *supra*, note 333; *Flegg* v. *Prentis*, [1892] 2 Ch. 428; *De Peyrecave* v. *Nicholson*, (1894) 42 W.R. 702.

[336] (1981) 13 B.L.R. 89 (B.C.S.C.).

Remuneration for a receiver is as fixed by the court.[338]

I. Actions Against the Sheriff

As will have been obvious from the preceding discussion, failure by the sheriff to perform his duties properly renders him liable to civil actions. Such actions are, in fact, the source of judicial delineations of the scope and nature of his duties. For greater certainty, a brief outline of the various civil actions to which he is liable, as well as an outline of his criminal or quasi-criminal responsibility would be useful as a checklist.

1. Actions by the Judgment Creditor

The sheriff will be liable to the execution creditor for failing to seize or for negligence in seizing. The measure of damages will be the value of the goods which were not seized because of the default on the part of the sheriff. No action will lie unless damage was actually suffered so if, for example, the sheriff was negligent in seizing but because of some supervening event, such as bankruptcy, nothing would have accrued to the judgment creditor in any event, no action will succeed.[339]

An improperly conducted sale which results in the obtention of an inadequate price for the goods sold may also subject the sheriff to an action for damages. Here the measure will be the difference between the price actually obtained and that which should have been obtained.[340]

Failure to pay over money levied after demand is made renders him liable to an action for money had and received[341] subject now, of course, to the applicability of the *Creditor Assistance Act*.

A common way of bringing an action against the sheriff, and one which put in issue the entire range of his duties, was to sue him for making a false return, but now it seems the judgment holder may sue for specific defaults in the execution process.

2. Actions by the Judgment Debtor

Though the seizure is valid, an illegal breaking will entitle the judgment debtor to damages from the sheriff. Even where the original entry and seizure were correctly carried out, the sheriff will become a trespasser and therefore subject to action if he remains in possession after the judgment has been satisfied or after the judgment creditor has given instructions to withdraw.[342] He may also be liable if he causes damage to other possessions or if he leaves a man in possession too long.[343]

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[337] *McLean* v. *Allen*, (1890) 14 P.R. 84.

[338] Rule 47 (3).

[339] *Arden* v. *Goodacre*, (1851) L.J. 20 C.P. 184; *Barnard* v. *Leigh*, (1815) 1 Stark 43, 171 E.R., 396; *Deering* v. *Mahon*, (1851) 2 I.R. (C.L.) 25 (C.P.); *Domine* v. *Grimsdall*, [1937] 2 All E.R. 119 (K.B.); *Donnelly* v. *Hall*, (1885) 7 O.R. 581 (Q.B.).

[340] *De Zouche* v. *Cook*, [1920] 2 W.W.R. 268 (Sask. K.B.); *Fair and Co. and Livingston* v. *Wardstrom*, (1919) 47 D.L.R. 16 (Alta. C.A.).

[341] *Morland* v. *Pellatt*, 8 B. & C. 722, 108 E.R. 1211; *Shuter and Wilkins* v. *Leonard*, (1833) 3 U.C.Q.B. (O.S.) 315; *Stebbins* v. *Williams*, (1914) 7 W.W.R. 141 (B.C.S.C. Chamb.).

[342] *Lee* v. *Dangar, Grant and Co.*, [1892] 2 Q.B. 337 (C.A.).

[343] *Barker* v. *St. Quintin*, 12 M. & W. 441, 152 E.R. 1270. Failure to pay over any surplus may result in an action: *see* *Ainslie* v. *Rapelje*, (1847) 3 U.C.Q.B. 275.

3. ACTIONS BY THIRD PARTIES

The interpleader process, to be discussed below, has eliminated many actions by third parties for wrongful seizure of their goods or trespass to their property because on the sheriff making an interpleader application, the court has power to stay such actions against him. If, however, the sheriff fails to interplead or if the sheriff causes substantial grievance by the seizure, then the third party retains full rights of action both for damages and for an injunction to stop the sale of property not belonging to the judgment debtor. The landlord of a commercial tenancy may also have an action if the sheriff fails to comply with section 1 of the *Commercial Tenancy Act* and pay off the rent due.

4. CRIMINAL AND QUASI-CRIMINAL LIABILITY

The *Sheriff Act* provides in section 9 that any director, sheriff or other person acting under the authority of a director or sheriff will commit an offence and be liable to the penalties under the *Offence Act*[344] if, directly or indirectly, he:

> (a) demand[s] or receive[s] any reward for performing or not performing his duties except as permitted by this or any other enactment; or
>
> (b) acquire[s] any property disposed of under execution by a sheriff.

The predecessor of section 9 (a) (found in both the English *Sheriff's Act, 1887* and the British Columbia Act in force in British Columbia until 1976) was held in *Shoppee* v. *Nathan*[345] to be a replacement for the old offences of extortion and contempt and therefore to require *mens rea*. Thus an inadvertent overcharge of fees and poundage due to clerical error did not constitute an offence.[346] It is probably safe to assume that the present section 9 will be given the same strict construction if it is ever invoked.

Section 117 of the *Criminal Code* provides that any peace officer (defined in section 2 as including sheriffs and their officers) or coroner who, being entrusted with the execution of a process, wilfully misconducts himself in the execution of the process or makes a false return to the process is guilty of an indictable offence and liable to imprisonment for two years.

Finally, failure to comply with the direction of the court contained in the writ or with a notice or order to return also subjects the sheriff to contempt proceedings which may be instituted by the judgment holder.[347]

J. Actions By and Protection for the Sheriff

1. AIDS IN EXECUTING

In addition to the possibility of becoming involved in litigation entailed in using sections 26 and 34 of the *Creditor Assistance Act*,[348] the sheriff may be obliged to sue in his own name for payment if he seizes the commercial paper rendered exigible by section 52 of the *Court Order Enforcement Act*. These actions will be for the sole purpose of completing the execution process.

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[344] R.S.B.C. 1979, c. 305.

[345] [1892] 1 Q.B. 245.

[346] *See also Lee* v. *Dangar, Grant & Co.*, *supra*, note 342; *Trustee of Woolford's Estate* v. *Levy*, [1892] 1 Q.B. 772 (C.A.) where submission to taxation of accounts negated either the demand or the *mens rea*.

[347] *Aireton* v. *Davis*, (1833) 9 Bing. 740, 131 E.R. 792; *Andrews* v. *Sharp*, (1773) 2 Bl. W. 913, 96 E.R. 538; *Blake* v. *Newburn*, (1848) 17 L.J.Q.B. 216; *Carman* v. *Mott*, (1846) 5 N.B.R. 131 (C.A.); *Genge* v. *Freeman*, (1891) 14 P.R. 330; *In Re Heiron's Estate: Hall* v. *Ley*, (1879) 12 Ch. D. 795; *Ketchum* v. *Muzzeroll*, (1854) 8 N.B.R. 347; *R.* v. *Moodie, Sheriff*, (1844) 1 U.C.Q.B. 410; *R.* v. *Sheriff of Devon*, (1847) 17 L.J.C.P. 116; *R.* v. *Sheriff of Essex*, (1839) 8 Scott 363, 6 Bing. N.C. 150, 133 E.R. 59.

[348] *See* text accompanying note 263 ff. *supra*.

For the same purpose he may sue for trespass and/or trover any stranger or even the judgment debtor who interferes with goods he has seized.[349] It is more common, however, to find persons dealt with by the contempt process[350] or under the criminal law. Valid seizure of the goods gives the sheriff a special property in them and a removal by anyone, including the judgment debtor, amounts to theft.[351] Also available as protection to the sheriff in actually seizing are the obstruction and assault provisions of the *Code*.[352]

2. PROTECTION

There are various ways in which the sheriff can forestall the actions against him outlined above, can defend himself if they are brought and can nullify the financial effect of a successful action.

(a) Interpleader

Interpleader relief at law was first made available to the sheriff in 1831.[353] Before 1831 the sheriff was not completely unprotected as the courts usually extended the time for making his return until the issue could be tried by the contending parties or until one of the parties gave the sheriff an indemnity.[354] In British Columbia provision is made in Rule 48 (2) for the sheriff to interplead and the procedure is outlined in the other parts of that Rule. Though interpleader does not offer absolute protection to the sheriff, it does minimize the actions to which he may be subject. A complex subject standing alone,[355] interpleader will be only briefly outlined here to show how it may be invoked by the sheriff to protect himself.

The Rules provide that a claimant of goods seized by the sheriff or which he intends to seize, or of the proceeds of goods sold already must deliver written notice of his claim to the sheriff. The sheriff in turn, must notify the judgment creditor, who must decide whether to admit or dispute the claim. If the judgment creditor admits the claim, the sheriff then abandons possession or delivers the proceeds to the claimant. The court is expressly empowered at this point to make an order restraining any action against the sheriff by the claimant. The order is discretionary[356] and the court will exercise its discretion in favour of the sheriff only if the claimant has suffered no substantial grievance.[357] To put the matter another way, the court will protect only against necessary mistakes honestly made.[358] Thus a trespass action will be stayed but not one for negligence.

If the judgment creditor decides to dispute the claim, then the sheriff should make an application for interpleader relief under Rule 48 (3) with the supporting affidavits required by Rule 48 (4). Rule 48 (6) sets out the powers of the court on the interpleader hearing. By Rule 48 (6) the court is given plenary discretion to protect the sheriff regardless of the outcome of the dispute as between the judgment creditor and the claimant. As previously discussed, the exercise of that discretion will depend on the conduct of the sheriff.

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[349] *Tyrrel* v. *Bash*, (1598) Cro. Eliz. 639, 78 E.R. 878; *Wilbraham* v. *Snow*, (1607) 2 Wms. Saund. 47, 85 E.R. 624; *Ackland* v. *Paynter*, (1820) 8 Price 95, 146 E.R. 1142.

[350] *See* cases cited at note 140, *supra*.

[351] *R.* v. *Hryciuk*, (1915) 8 W.W.R. 1169; 25 D.L.R. 490 (Sask. S.C.); *R.* v. *Jacobson*, [1944] 1 W.W.R. 97 (Alta.S.C.); *R.* v. *Vroom*, [1975] 4 W.W.R. 113 (Alta. C.A.).

[352] *R.* v. *Backhouse*, (1772) Lofft 62, 98 E.R. 533; *R.* v. *Fritz*, (1978) 6 B.C.L.R. 314 (B.C.S.C. Chamb.); *R.* v. *Monkman*, (1891-92) 8 Man. R. 509 (Q.B.); *R.* v. *Stuart*, [1946] 1 W.W.R. 37 (Sask. C.A.); *R.* v. *Todd*, (1978) 6 B.C.L.R. 66 (Prov. Ct.); *R.* v. *Wingfield*, (1632) Cr. Car. 251, 79 E.R. 819; *Lewis* v. *Owen*, [1894] 1 Q.B. 102.

[353] 1 & 2 Will. 4 c. 58. For an account of the origins of interpleader, *see* R.V. Rogers, "Historical Origins of Interpleader" (1942) 51 Yale, L.J. 924.

[354] W.H. Watson, *The Office of Sheriff* (1848) at 280.

[355] *See generally* R.J. MacLennan, *The Law of Interpleader* (1901); M. Cababe, *Interpleader* (3d. ed. 1900).

[356] *Brownlea* v. *Eads*, (1905) 2 W.L.R. 123 (Y.T.S.C. Chamb.).

[357] *Cave* v. *Capel*, [1954] 1 Q.B. 367, [1954] 1 All E.R. 428 (C.A.); *De Coppett* v. *Barnett*, (1900) 17 T.L.R. 273 (C.A.); *Smith* v. *Critchfield*, (1884) 14 Q.B.D. 873 (C.A.); *London, Chatham and Dover Ry. Co.* v. *Cable*, (1899) 80 L.T. 119.

[358] *Brackenbury* v. *Laurie*, (1834) 3 Dowl. 180; *Deering* v. *Mahon*, (1851) 2 I.R. (C.L.) 25.

Interpleader relief will not, of course, be available to the sheriff if he has not only sold the goods but also paid over the money. Nor will he be entitled to apply if he has seized but withdrawn, the reasoning being that he has already exercised his discretion and is not intending to take the goods.[359] The basis for the exclusion of both cases is that the sheriff is not in a position to deliver either the property or the proceeds thereof to the court and that is a precondition of interpleader. Furthermore, he is obliged to make some reasonable inquiry as to ownership before he makes an interpleader application.[360]

(b) Indemnity

Another way in which the sheriff can protect himself from the consequences of illegal seizing of goods is to ask for an indemnity or an undertaking to indemnify. In only two situations, however, must an undertaking be given. Section 8 of the *Sheriff Act* reverses the common law rule and obliges the solicitor for the judgment creditor to enter into an undertaking as to the reasonably anticipated costs of the process and section 55 of the *Court Order Enforcement Act* requires the execution creditor to indemnify the sheriff if the sheriff is to sue to enforce payment under seized securities for money.

The reports are replete with cases in which the sheriff has asked for an indemnity and been refused and had to act at his peril. On the other hand, there are cases in which the courts have indicated a willingness to find an implied indemnity. The strongest statement of this approach is contained in *Sheffield Corporation* v. *Barclay*, where Lord Davey stated:[361]

> I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another . . . and without any default on his own part, in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request.

Though *Sheffield Corporation* v. *Barclay* was not itself a case concerning sheriffs, Lord Davey was relying on sheriff cases for the origin of the principle stated. This case has been cited with apparent approval in *dicta* in the Alberta Supreme Court,[362] but there is no indication that the sheriff is safe to rely on an implied contract of indemnity in British Columbia.

The sheriff may seek an indemnity for seizing from the judgment creditor or from the claimant to the exigible property for withdrawing, but he may not refuse to act if neither accedes to his request.[363] No rule prohibits the sheriff from routinely asking for indemnification before every seizure, but it is only cases in which doubt arises as to the judgment debtor's ownership of the goods that an indemnity is really needed.

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[359] *Holton* v. *Guntrip*, (1837) 6 Dowl. 130, 150 E.R. 1092.

[360] *Bishop* v. *Hinxman*, (1833) 3 D.P.C. 166.

[361] (1905) 74 L.J.K.B. 747 at 750 (H.L.).

[362] *Mandelin* v. *Stan Reynolds Auto Sales Ltd. et al.*, (1961) 31 D.L.R. (2d) 697 (Alta. S.C.).

[363] *See* Watson, *supra*, note 354 at 478-79 for alternate forms of indemnity. Even if one party undertakes to indemnify the sheriff, that agreement creates a conditional liability only which may be withdrawn before any act is done or any damage sustained: *Grange* v. *Mills*, (1864) 19 U.C.C.P. 398.

After an action has been successfully brought against the sheriff for wrongful seizure,[364] if the person who has entered into the undertaking fails to fulfill his obligation to indemnify, the sheriff has a cause of action against him. The obligor, to protect himself should have taken the defence of the sheriff upon himself but if he has failed to do so he must abide the consequences of the litigation and "save the sheriff harmless".[365] In any action to enforce the undertaking, however, the obligor may raise the conduct of the sheriff in executing the writ and may be relieved from his undertaking if, for example, the sheriff has seized after instructions not to, or has been guilty of negligence or willful wrongdoing.[366]

The sheriff, of course, is not obliged either to ask for or accept the offer of an indemnity. He may choose to rely instead on interpleader. If, however, he does accept an indemnity, then the protection offered by the interpleader process is probably not available.[367] The protection ultimately offered by each is comparable. The main difference is that by using interpleader the sheriff can forestall or have stayed an action against him whereas if he chooses to seek indemnity, he must endure an action.

3. DEFENCES TO ACTION

A first line of defence for the sheriff is the existence of a writ valid on its face. Though the judgment be void or set aside, and the judgment creditor thereby rendered liable for acts done in execution, the sheriff is protected.[368]

The validity of the writ will be relevant to the Crown also if the Crown should be joined in an action against the sheriff. Section 3 (2) (a) (ii) of the *Crown Proceeding Act*[369] provides that nothing in section 2, which abolishes proceedings by petition of right and renders the Crown subject to all those liabilities to which it would be liable if it were a person,

> (a) authorizes proceedings against the Crown for anything done or omitted to be done by a person acting reasonably and in good faith while discharging or purporting to discharge responsibiliies
>
> (ii) that he has in connection with the execution of judicial process.

4. ACTIONS

Finally, in appropriate circumstances, the sheriff may have the option of nullifying the effect of a successful action against him by suing the judgment creditor or his solicitor for the misrepresentation which led him to the wrongful seizure.[370] He would be better advised, however, to forestall possible actions by interpleading.

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[364] *Ruttan* v. *Conger*, (1859) 9 U.C.C.P. 16 holds this to be a precondition for an action by the sheriff on the indemnity bond. Proof of payment is not necessary however. *Bonnett* v. *Ritchie*, (1887) 20 N.S.R. 228 (S.C.).

[365] *Thomas, Sheriff* v. *Johnston*, (1847) 4 U.C.Q.B. 110.

[366] *Mandelin* v. *Stan Reynolds Auto Sales Ltd. et al.*, *supra*, note 362; *McMahon* v. *Ingersoll*, (1842) 6 U.C.Q.B.O.S. 301 (C.A.).

[367] *Ostler* v. *Bower*, (1836) 4 Dowl. 605; *Adams* v. *Blackwell*, (1884) Ont. Pr. 168. Cababe, *supra*, note 355 at 38; MacLennan, *supra*, note 355 at 57. But for a contrary holding, *see Crothers* v. *Grant*, [1934] Aust. L.R. 127 (Vict.) and the comment in (1934) 8 Aust. L.J. 16. The *Seizures Act*, R.S.A. 1942, s. 21 (2) discussed in *Dubuc* v. *Tarrabain and Lemay*, (1955) 14 W.W.R. (N.S.) 278 (Alta. C.A.) provided that the taking of security would not affect the right to interpleader.

[368] *Andrews* v. *Marris*, (1841) 1 Q.B. 3, 113 E.R. 1030; *Carratt* v. *Morley*, (1841) 1 Q.B. 18, 113 E.R. 1036; *Carter* v. *Purrington*, (1851) 7 N.B.R. 226; *Clissold* v. *Cratchley*, [1910] 2 K.B. 244 (C.A.); *Countess of Rutland's Case*, (1605) 6 Co. Rep. 52b (Star Chamber), 77 E.R. 332; *Ives* v. *Lucas*, (1823) C. & P. 7, 171 E.R. 1079; *Pattison* v. *Tingley*, (1863) 10 N.B.R. 553 (S.C.); *Jones* v. *Williams*, (1841) 8 M. & W. 349, 151 E.R. 1073; *McPhail* v. *McKinnon*, (1868) 7 N.S.R. 168 (S.C.); *Parsons* v. *Lord*, (1772) 3 Wils. K.B. 341, 95 E.R. 1089; *R.* v. *Fritz*, (1978) 6 B.C.L.R. 314 (S.C.); *R.* v. *Monkman*, (1891-92) 8 Man. R. 509 (Q.B.); *Ramanathan Chetty* v. *Meera Saibo Marikar*, [1931] A.C. 77 (P.C., Ceylon); *Simpson* v. *Water Conservation and Irrigation Commission*, (1917) 17 S.R.N.S.W. 493 (S.C.); *Turner* v. *Felgate*, (1675) 1 Lev. 95, 83 E.R. 315; *Barker* v. *Braham and Norwood*, (1773) 3 Wils. K.B. 368, 95 E.R. 1104.

[369] R.S.B.C. 1979 c. 86.

[370] *Moodie* v. *Dougall*, (1862) 12 U.C.C.P. 555. Whether the solicitor could be sued successfully for negligence is doubtful. In *Childers* v. *Wooler*, (1860) 6 Jur. N.S. 444, the court considered that the solicitor's only duty was to his client, not to the sheriff.

K. Remuneration

At common law the sheriff was entitled to absolutely no remuneration. By the time of Elizabeth I, this was perceived to be discouraging to the performance of his duties[371] and by 29 Eliz., c. 4, the sheriff was allowed poundage or commission on the amount of the judgment levied. In the reign of George I the sheriff was allowed the further compensation of the fees and expenses of execution expressly permitted by a schedule compiled by the Lord Chancellor.[372]

The sheriff in British Columbia is now a salaried public employee but he still collects from the execution creditor three categories of charges, poundage, fees and expenses, though such charges now go to consolidated revenue rather than to the sheriff. The Federal Court Rules adopt the provincial tariff of fees but the Federal Court retains a discretion to vary. The authorization for payment to the sheriff of poundage, fees and expenses is now found in section 2 of the *Court Rules Act*,[373] and section 9 (1) (a) of the *Sheriff Act* maintains the tradition of granting permission to collect by a negative pronouncement that any demand for reward not permitted by any enactment constitutes an offence.

1. Responsibility for Charges

It has been settled law from the time of Elizabeth I that the judgment creditor is immediately responsible for payment of the sheriff's charges though ultimately they are paid by the judgment debtor.[374] The costs and fees entailed in execution are added to the judgment and the whole amount is levied. The sheriff simply deducts his charges before paying over the proceeds to the judgment creditor. By Rule 42 (16) of the British Columbia Rules and Rule 2005 (6) of the Federal Court Rules, the creditor is expressly authorized to proceed in this way. Writs of delivery and possession also expressly authorize a levy for sheriff's charges. Even if the writ is not specifically endorsed for sheriff's charges, he is entitled to levy for them.[375] Failure by the execution creditor to pay the sheriff gives rise to an action against him.[376]

Section 7 of the *Sheriff Act* expressly reverses the common law and makes the solicitor whose name appears on the writ responsible for the fees and expenses of service or execution. Section 8 of the Act provides that the sheriff is entitled to refuse to act unless he is either paid in advance or an undertaking to pay is entered into.

2. What Charges

Levy by seizure and sale is the simple situation. The only questions which can arise are whether poundage is correctly calculated and whether all the expenses are permissible.

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[371] Atkinson, *supra*, note 1 at 255 says:

> . . . they became backward in executing writs by reason of the great danger in taking desperate men as well as in detaining them for fear of escapes . . .

Fees, then, were really intended to induce expedition in arresting, and execution against goods benefitted by a side wind, as it were.

[372] That still left many duties unremunerated as Lord Ellenborough C.J. noted in *Graham* v. *Grill*, (1814) 2 M. & S. 294, 105 E.R. 391 at 297:

> There are many onerous duties cast on the sheriff, for which the law has not provided distinctly any remuneration, and this is one reason for appointing men of substance to the office, that they may be able to bear those duties.

[373] R.S.B.C. 1979 c. 77.

[374] *Montague* v. *Davies, Benachi & Co.*, [1911] 2 K.B. 595.

[375] *Curtis* v. *Mayne*, (1842) 2 Dowl. (N.S.) 37, 7 Jur. 154.

[376] *Montague* v. *Davies, Benachi & Co.*, *supra*, note 374; *Rankin* v. *Bell*, [1923] 2 W.W.R. 922 (B.C. Co. Ct.)

Poundage is to be calculated on the amount *actually levied* by the sheriff, not on the amount of the judgment endorsed on the writ if the levy does not satisfy the creditor in full.[377] This rule is reflected in the phrasing of section 2 (c) of Schedule 2 found in Appendix C of the Supreme Court Rules: commission "on the sum realized or settled for." If, on the other hand, the amount levied is greater than the amount endorsed on the writ, poundage is calculated on the lesser sum. The sheriff pays the creditor in full and pays the surplus to the debtor.

Schedule 2 contains no itemized list of expenses such as is to be found in earlier versions. There is merely a clause permitting the sheriff to charge for "all disbursements properly incurred." While such a general clause does preclude cases like *Phillips* v. *Viscount Canterbury*,[378] in which the court with some regret had to disallow a charge for the costs of an appraisal because it was not included in the table of fees, the matter of the appropriateness of the disbursement is left undefined. Disputes can be submitted for taxation under Rule 57, however, there is no evidence of dissatisfaction with the expenses usually charged. In the last two years at least, no cases have been submitted to the taxing officers at Vancouver.

Possession charges when a walking possession agreement is used were a recurring problem in this area,[379] but since no provision is made in the Schedule to the British Columbia Rules for possession *per se*, except with respect to arrest of ships, and since the sheriff is authorized only to charge per hour for attending, investigating, inventorying, cataloguing, taking possession and preparing for sale,[380] it seems likely that no problems will arise: if the sheriff cannot charge a possession fee for maintaining possession, *a fortiori* he cannot so charge when he uses a walking possession agreement.

3. MORE THAN ONE EXECUTION CREDITOR

Special provisions were required to regulate the sheriff's charges when the *Creditor Assistance Act* replaced the common law rule of priority. The sheriff's fees and the costs of execution to the creditor at whose instance the seizure and levy were made are given the usual priority by section 27 and sections 29 and 34 (4) regulate poundage. Poundage is to be calculated on the net proceeds of the estate distributed and not on each writ or claim and it is to be calculated as if the whole amount had been paid under one writ.

4. INTERPLEADER

When the judgment creditor admits the right of a claimant to property seized by the sheriff at his instance, Rule 48 (2) (c) limits the claim of the sheriff for any costs, fees and expenses incurred to those which accrue before receipt of the notice admitting the claim, although the court retains a discretion to order otherwise. In the question of entitlement for costs and fees up to the time of notice, the legality of the seizure is irrelevant but any negligence on the part of the sheriff may be crucial.[381] The discretion is said, however, to be exercised against the sheriff with reluctance.[382] Entitlement to poundage, on the other hand, depends entirely on the legality of the seizure so if the claimant succeeds no poundage is available.[383]

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[377] *Sturgeon* v. *Henderson*, [1917] 3 W.W.R. 56 (Man. K.B.); *Campbell, Wilson and Strathdee Ltd.* v. *Gimple*, (1914) 7 W.W.R. 337 (Sask. S.C. Ch.).

[378] (1843) 11 M. & W. 619, 152 E.R. 953. The Saskatchewan King's Bench held in *McGregor* v. *Klotz*, [1929] 4 D.L.R. 792 that in the event of a dispute about expenses, the onus rests on the sheriff to establish that they were reasonably incurred and not on the judgment creditor to disprove reasonableness.

[379] *See*, *e.g.*, (1935) 79 Sol. J. 105 and 159.

[380] Section 2 (b).

[381] A.G., "Seizure of the Wrong Man's Goods" (1949) 93 Sol. J. 401.

[382] *Ibid.*

If the judgment creditor disputes the claimant's right to the property, there may be additional costs of possession or caring for the property while the litigation proceeds, for which the sheriff might be entitled to charge. The English Rules contain an express provision empowering the court to order a sale of the property and payment of the proceeds into court.[384] The object is, of course, to minimize costs and charges which could consume the whole value of the property. The British Columbia Rules contain no such express provision but Rule 48 (6) (i) authorizes the court to make such other orders as it thinks just so a similar order can probably be made. Costs of the sheriff come out of the proceeds.

5. NO LEVY

It is not unusual for the sheriff to commence an execution by seizure but never reach the stage of actually levying in the sense of receiving money. The question of whether he is entitled to any remuneration in that situation is answered, at least in part, by section 106 of the *Court Order Enforcement Act*, with separate subsections for land and for personal property.

(a) Land

Section 106 (2) provides that where land has been advertised for sale by the sheriff but is not actually sold either because satisfaction has been otherwise obtained or for some other cause, the sheriff is still entitled to his fees, expenses and poundage based on the "assessed value" of the land. Two points arise from this provision. First, since poundage is calculated on the sum realized or settled for, the reference to the assessed value of the land is inexplicable. There is no necessary correspondence between the two. The sum realized or settled for is usually less and often far less than the assessed value of the land. Second, since the execution sale may have been aborted for some other cause and no satisfaction obtained, as for instance a simple withdrawal of the writ, the reference to entitlement to fees and poundage must be read down. The sheriff should surely be entitled only to his reasonable disbursements in such a situation. If there is an intervening bankruptcy, the provisions of the *Bankruptcy Act* discussed above, must govern by virtue of the doctrine of paramountcy. Section 101 of the *Court Order Enforcement Act* which provides that no proceeding shall be deemed to have abated nor shall any order for the sale of land nor any sale under it be affected by bankruptcy, must thus be inoperative in the face of section 50 (1) of the *Bankruptcy Act* or else given an interpretation not inconsistent with it. Section 106 must be coordinated with section 50 (2) of the *Bankruptcy Act* which permits payment of the sheriff's fees only for one creditor. Exactly how section 50 (2) applies in British Columbia where no execution or process is lodged with the sheriff is not immediately evident.

(b) Personal Property

Fees, poundage and expenses may also be charged by the sheriff where there has been no "levy" by him if he has seized personal property and if there has been some settlement.[385] Calculation is to be made on the smaller of the amount settled for or the judgment, a strange provision since it would surely be unusual to settle for an amount greater than the judgment. In other words, the sheriff gets full remuneration if he seizes but does not have to sell.

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[383] *McDonald Co. v. Cushing*, [1918] 3 W.W.R. 89 (Sask. K.B.).

[384] O. 17 r. 6.

[385] *Court Order Enforcement Act*, s. 106 (3).

The final clause of section 106 (3) has produced some litigation. It appears to give the court discretion to adjust the rate where there has been a settlement after seizure. However, the interpretation which has been placed on the section has virtually extinguished the legislative attempt to confer a discretion. The learned judge in *Workers Compensation Board* v. *Island Cash Buyers*,[386] held that the discretion was available only where there was a compromise *before* seizure, apparently overlooking the fact that if a compromise occurs before seizure, then the sheriff is entitled to nothing, having done nothing to earn fees or poundage. If the sheriff is entitled to nothing, there is no rate to be adjusted and nothing for the discretion to operate on.

Section 106 (3) does not replace the British Columbia Court of Appeal decision in *Richards* v. *Producers Rock and Gravel*,[387] which held that in the event of a settlement between the parties, the onus was on the sheriff to establish that such settlement was caused by action on his part, but proof of a post-seizure compromise or settlement apparently puts a burden of explanation on the person disputing the sheriff's charges.[388] There is no qualification of the term "seizure" but that part of *Richards* which held that the seizure must be valid to entitle the sheriff to anything must also still apply.

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[386] (1980) 19 B.C.L.R. 190 (B.C.S.C.).

[387] (1914) 27 W.L.R. 890, 17 D.L.R. 588 *aff'd.* 20 B.C.R. 109, 113 (C.A.).

[388] *Bean* v. *Pauker*, (1980) 20 B.C.L.R. 244 (B.C.S.C.).

CHAPTER VIII

THE SERVANT OF TWO MASTERS

Chapters V, VI and VII described the powers available to the sheriff as a Crown and a court officer and the responsibilities he could be called upon to discharge when acting, in the first case at the command of the government and in the second case at the direction of the courts. In this chapter, attention is focused on what the sheriff can or must do when doing work which cannot so neatly be categorized as that of Crown or courts. Thus, it is not clear who is to instruct or order the sheriff concerning this work.[1] It must be decided whether it is desirable for the sheriff ever to be placed in the position of having to choose whose bidding to do. Fortunately, in practice, he does not often have to make the choice. But even knowing that at some time he may have to choose may influence the way in which he does his work. This chapter is about service of process, escort duties and jury "administration."

A. Service of Process[2]

1. Civil Process

(a) Must the Sheriff Receive Process for Service?

(i) *In the Supreme Court of British Columbia*

It may come as a surprise to some people in British Columbia,[3] including (it would seem) the Attorney General,[4] to learn that the sheriff in this Province is not as a matter of law obligated to receive Supreme Court civil process tendered to him for service, except where a statute specifies that he must receive it.[5]

The absence of a duty may come as a surprise because the sheriff has, as a matter of course, served civil process, including process issuing from the

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[1] Chief Justice Deschenes recognized this problem of divided loyalty in his report on the *Independent Judicial Administration of the Courts* (1981) at 43-4, but His Lordship said no more than that a "somewhat arbitrary decision" would have to be made about the sheriff in determining whether his activities should be administered by the courts or by the executive. The need for an "arbitrary" decision would be obviated if the suggestions made in Chapter IX of this report are taken up.

[2] According to information obtained from correspondents, the sheriff serves both civil and criminal documents in Prince Edward Island, Nova Scotia, New Brunswick, Ontario and Manitoba and serves civil but only some criminal documents in Newfoundland and Alberta. In Tasmania, Queensland and Western Australia, he serves civil documents only. In South Australia, he serves both civil and criminal documents, but in the Supreme Court only. In New South Wales, he serves both kinds of documents in all courts. The sheriff serves no civil or criminal process in the State of Victoria or in England but serves both kinds in the several provincial and local divisions of the Supreme Court of South Africa. For a discussion of service of process in France, *see* D. Martin, *Study of the Profession of Huissiers de Justice* (1980) at section 10.

[3] In 1977, a Task Force created by the director of sheriff services reported, saying that: "The service of suitors' process in civil causes is a long-standing function of sheriffs, a historical duty of the office:" *see Report of the Task Force on Sheriff Services* (May 1977) at 43. Two of the members of the Task Force were at one time "fees" sheriffs. It is interest to note that the Task Force mentioned that service of civil process generated Crown revenue of over $1,000,000.00 annually (at 43).

[4] A former Attorney General, the Hon. Mr. Gardom, told the Legislative Assembly in June 1976, when introducing the Bill which became the *Sheriffs Act*, S.B.C. 1976, c. 50, that "service of civil documents," one of "the sheriffs' former responsibilities," was continued under the new legislation: *see* (1976) 4 Debates of the Legislative Assembly for British Columbia 3133. In Ontario, where the legislation and rules are no clearer, the draft manual for sheriffs declares: "It is the responsibility of the Sheriff to effect service of all processes delivered to his office as promptly as is reasonable . . . ." Later in this part of the chapter, the question is raised of how quickly a sheriff must act after he has undertaken to do so, even in the absence of a duty to receive process.

[5] Nothing in the *Supreme Court Act*, R.S.B.C. 1979, c. 397 requires the sheriff to accept documents for service. And Rule 11 of the *Rules of Court*, which deals with "Service and Delivery of Documents," does not impose the duty. The sheriff does not have the responsibility just because he is, by s. 5 of the *Sheriff Act*, R.S.B.C. 1979, c. 386, an officer of all the courts in the Province. The sheriff was an officer of the High Court in England at common law but, as this chapter will show, he was only obligated to act when specifically directed to do so. This state of things is not inconsistent with what is known of his responsibilities generally. It was suggested in Chapter VI that the sheriff is required to maintain order in the courts, perhaps even without a specific order to that effect from a judge. But even there, the responsibility may flow from the "precept directed to the sheriff" from the judges of assize: *see, e.g.*, J. Impey, *The Office of Sheriff* (1786) at 371.

Nor is it likely that the duty can be found in the principle stated in *Rex* v. *Lydford*, [1914] 2 K.B. 378 at 385 (C.C.A.). That was the case which confirmed that the sheriff is the proper person to carry out the orders of "the Court" where a statute has not named the executive officer who is to be responsible. The case says no more than that the sheriff must act when ordered to do so. As this section shows, when process—apart from writs of execution—is issued in this Province, it is not issued with an order from the court that it be served, either by the sheriff or by anyone else.

Supreme Court, since shortly after the Province joined Canada in 1871,[6] and he probably served it before that time as well. For that historical reason, a misapprehension on a large scale is understandable.

The explanation which supports the conclusion that the sheriff has no such duty begins with the inevitable trip to Saxon England. In those times, the sheriff, as the King's principal representative in the shire, did what the King commanded him to do.[7] The commands were ordinarily made by writ.[8] By the reign of Henry II,[9] it was common for the sheriff to receive a direction which began: *"Rex vicecomiti salutem"*—"The King to the sheriff, greeting."[10] The commands directed to the sheriff were of the most varied kinds,[11] as these examples demonstrate:

> I command you to send without delay four lawful knights from your county, to ascertain whether the sickness for which N. essoined himself against R. in my court is bed-sickness or not.[12]
>
> Command N. justly and without delay to release the advowson of the church in such-and-such a vill to R., who claims that it belongs to him and complains that N. unjustly witholds it from him. If he does not do this, summon him by good summoners to be at such-and-such a place on a certain day before me or my justices, to show why he has not done it. And have there the summoners and this writ.[13]
>
> If G. son of O. gives you security for prosecuting his claim, then summon by good summoners twelve free and lawful men from the neighbourhood of such-and such a vill to be before me or my justices on a certain day, ready to declare on oath whether O. the father of G. was seised in his demesne as of his fee of one virgate of land in that vill on the day he set out for Jerusalem (or for St. James), on which journey he died, and whether he set out after my first coronation, and whether G. is his next heir. And meanwhile let them view the land . . . .[14]

In later Angevin England, writs to the sheriff were at least as common. As Morris says:[15]

> The function of the sheriff's office in serving and executing a great bulk of judicial writs, so abundantly attested by Glanville in the days of John's father, now finds mention in numerous acts enjoined upon the sheriff in furtherance of judicial process. Royal letters occur ordering him to enforce judicial decree, to make special inquest, to bring the assizes of novel disseisin of the county before the justices of jail delivery. Court rolls relate that he is ordered to attach certain persons, to seize land or chattels, to record by law-worthy men proceedings formerly held in the county court, to make inquests or partition of lands, to answer why writs or lists of pledges had not been sent to Westminster as directed.

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[6] *See, e.g., Sheriffs Act*, S.B.C. 1873, No. 7, s. 24. Under this provision, each sheriff was required to keep a process book "in which shall be entered a memorandum of every process other than writs of execution, or writs in the nature of writs of execution received by the Sheriff." No distinction between courts was made. *And see Fees Act, 1879*, S.B.C. 1879, c. 16, s. 1 which provided that where any "proceeding" in the Supreme Court was delivered at the office of the sheriff, he was required to endorse it with the time it was delivered. "Proceeding" was defined in s. 16 of the *Act* to include "a bill or information in equity, writ of summons, writ of ejectment, or other writ (non-bailable) at law, citation in probate, and notice, subpoena and other proceedings at law, in equity, probate, or otherwise." Section 3 of this *Act* provided that no mileage was to be taxed or allowed to a party for service unless service was made by the sheriff, his deputy or bailiff. This rule was one way of giving the sheriff an effective monopoly over service, but there was still nothing in the *Act* which specifically imposed on the sheriff the duty to serve. In fact, s. 1 provided that if the sheriff had not within 10 days served a proceeding delivered to him, he must re-deliver it to the party. There was no provision for a penalty if the sheriff did not serve—only if he failed to re-deliver (*see* s. 2). *See also* the report entitled "Official Blackmail" in *The Cariboo Sentinel* (published at Barkerville) for 28 November 1874 at 2, where it was said that: "Mr. McWha . . . complains of the conduct of the Sheriff of Cariboo in charging him a high figure for the service of summonses which were never served, and refusing to refund the money." It is not made clear by the report, but it seems likely because the word "summonses" and not the phrase "Writs of Summons" is used, that the complaint arose from proceedings in an inferior court. The sheriff and service of process in the inferior court is discussed in the next two sections of this chapter.

[7] *See, e.g.*, I. Gladwin, *The Sheriff: The Man and his Office* (1974) at 26-7.

[8] *See, e.g.*, A. Harding, *A Social History of England* (1966) at 28-9.

[9] He was King from 1154 to 1189: *see* G.S.P. Freeman-Grenville, *The Queen's Lineage* (1977), at 12.

[10] *See, e.g.*, G.D.G. Hall, ed., *The Treatise on the Laws and Customs of England Commonly Called Glanvill* (1965) at 9. *And see* Selden Society, 2 *Fleta* (1955), *passim*.

[11] *See, e.g.*, W. Morris, *The Medieval English Sheriff to 1300* (1927) at 121-2.

[12] *Glanvill*, *supra*, note 10 at 11.

[13] *Ibid.* at 45.

[14] *Ibid.* at 150.

[15] *Supra*, note 11 at 146-7.

Thus, even before the reign of Edward I, which began in 1272,[16] the sheriff was closely tied to the civil process of the King's courts. It is learned from Morris[17] that the " . . . person who obtained a writ at the chancery for a half mark, as the Fine Rolls show in hundreds of cases, usually took it to the sheriff to institute proceedings." Pollock and Maitland say:[18]

> . . . we have the civil procedure which is begun by Original Writ. Here the 'original writ itself will indicate the first step that is to be taken, in other words, the 'original process'; and the subsequent steps (the 'mesne process'), which will become necessary if the defendant is contumacious, will be ordered by 'judicial' writs which the justices issue from time to time as defaults are committed. Throughout, the sheriff acts as the court's minister; he does the summoning, attaching, distraining, arresting . . . .

What must be noticed about the sheriff's involvement in the administration of justice from the reign of Edward the Confessor (or earlier) through the 14th century[19] is that he acted on command of the King himself or of the King's court. There is no suggestion that he did official business in the absence of a formal direction from one or other of those sources.

By the 16th century, as Holdsworth describes:[20]

> The office of sheriff had declined from its former magnificence. But it had secured a permanent place in the local government. The sheriff was the official entrusted with the execution of royal writs. He had therefore become the agent to set in motion the complicated process of all the royal courts, criminal and civil, central and local.

Thus, in 1625, Coke could say:[21] "no suit begins, and no processe is served but by the sherife"—the monopoly, perhaps, being *quid pro quo* for loyalty to the Crown. And Sir Francis Bacon could add:[22]

> This Sheriffe doth serve the Kings Writs of Processe, be they Sommons, Attachments to compell men to answer to the Law, and all Writs of execution of the Law, according to Judgements of Superiour Court, for taking of Mens Goods, Lands, or Bodies, as the cause requireth.

In 1636, Dalton said that one of the sheriff's duties was:[23]

> Truly to accomplish and execute all manner of Writs, Process Judgments, Executions, and Precepts directed to him from any of the King's Courts.

Later still, in 1736, Giles Jacob wrote that:[24] "[T]he ministerial Power of a *Sheriff* consisteth in the Execution of Writs and Processes out of the King's Courts," and, borrowing from Coke: "no Process is to be serv'd but by the *Sheriff*, wherein he ought not to dispute the Validity of any Writ, but to execute it." Later, Blackstone said:[25]

> In his *ministerial capacity*, the sheriff is bound to execute all process issuing from the King's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail . . . .

In 1786, these words were repeated *verbatim* by Impey.[26]

Original writs did not prove to be popular. By the 18th century, ingenuity had produced many ways to avoid them in launching a cause:[27]

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[16] *See* Freeman-Grenville, *supra*, note 9 at 12.

[17] *Supra*, note 11 at 207.

[18] Sir F. Pollock and F.W. Maitland, 2 *The History of English Law Before the Time of Edward I* (2nd ed., 1923) at 591. *See also* H.J. Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (4th ed., 1838) at 5-6.

[19] *See* Sir W.S. Holdsworth, 3 *A History of English Law* (5th ed., 1942) at 625, where "many writs and orders to the sheriffs" are mentioned.

[20] 4 *A History of English Law* (3rd ed., 1945) at 122.

[21] Co. Inst. Part I, 168a.

[22] As Lord Verulam, *The Use of the Law* (1639) at 7.

[23] M. Dalton, *Officium Vicecomitum or The Office and Authoritie of Sherifs* (1623) at 18.

[24] *A New Law-Dictionary* (1736) under the title, "Sheriff, Shiriff or Shrire-reve."

[25] 1 Bl. Comm. 344.

[26] Impey, *supra*, note 5 at 53 and *see also* at 54.

[27] *See* Sir W.S. Holdsworth, 9 *A History of English Law* (3rd ed., 1944) at 250, quoting from the *First Report Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law* (1829).

> Of all these methods of beginning an action the most common was a *capias ad respondendum*, i.e. a writ directing the sheriff to arrest the defendant. This process was possible in all the most usual personal actions; and, where it was possible, it became the practice, in the course of the eighteenth century, to 'resort to it in the first instance, and to suspend the issuing of the original writ, or even to neglect it altogether, unless its omission should afterwards be objected by the defendant. Thus the usual *practical* mode of commencing a personal action by original writ is to begin by issuing, not an original, but a *capias*'."

Obviously there were too many unnecessary arrests. In 1725, Parliament enacted legislation to prevent them[28] by prohibiting the arrest of defendants on process issuing out of any superior court "where the cause of action shall not amount to the sum of ten pounds or upwards; [and] out of any inferior court, where the cause of action shall not amount to the sum of forty shillings or upwards." There was to be no arrest in these cases but, instead, the "plaintiff or plaintiffs" were to "serve" the defendant or defendants "personally within the jurisdiction of the court, with a copy of the process." Action on the writ by the sheriff is presumed: there is mention in the second section of the *Act* of "the sheriff or other officer to whom such writ or process shall be directed."

This *Act to Prevent Frivolous and Vexatious Arrests* was "explained, amended and rendered more effectual" in 1732. The amending statute suggests that the sheriff's participation was no longer essential, as it had been since Coke's time at least, or even desirable, because provision was made:[29]

> That no attorney, bailiff or other person, shall have, take, charge or demand more than five shillings, for the making and serving a copy of such process issuing out of any superior court . . . .

Nonetheless, in 1829, as the Commissioners appointed to inquire into the practice and proceedings of the Superior Courts of Common Law report, the writ in both "serviceable or non-bailable"[30] and in "bailable" cases were still "always directed to the sheriff of the county where the defendant is supposed to reside:"[31]

> But those of the former kind are not delivered to the sheriff to be executed; they are in fact served by the plaintiff's attorney, or those whom he employs, and the direction to the sheriff is nugatory and inconsistent with the real character of the process.[32]

The distinction between "directing" a writ to the sheriff—the legal means by which he was informed that he must act—and "deliverying" it to him—a physical step important only as a matter of proof — is a distinction that must be grasped. It is easy to understand why the distinction was made: the sheriff was not a paid servant of the Crown or of the courts; he was an independent businessman who "contracted" with both institutions and for whom obligations arose by reason of the contracts.

It follows from all of this that if the sheriff acts on process from the courts at all, he acts because and only if a writ directs him to act.[33] Nothing has really changed from Saxon days. Absent the writ, absent the duty. There is support for this thesis. Having declared the sheriff and his officers to be a "mere incumbrance" in those cases where arrest was not possible, the Commissioners recommended that " . . . the Writ of Summons be addressed to the defendant, and not to any sheriff"[34] and that it " . . . may be executed by any person who may have the charge thereof, and without the intervention of the sheriff or other officer."[35]

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[28] *An Act to Prevent Frivolous and Vexatious Arrests*, 12 Geo. I, c. 29 (1725), s. I.

[29] 5 Geo. II, c. 27 (1732), s. II. *See also* R.W. Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952) at 85.

[30] *First Report*, *supra*, note 27 at 85. *See also* W. Tidd, *The Practice of the Court of King's Bench and Common Pleas*, (9th ed., 1828) at 166, footnote "g."

[31] There is some proof of this fact in *Foster* v. *Bonner*, (1776) 2 Cowp. 454, 98 E.R. 1183, 1184, where Lord Mansfield said, with reference to 12 Geo. I, c. 29 (1725): ". . . the sheriff or his officer can now only personally serve the defendant with a copy of the writ or process; and with notice in writing thereon, to appear by his attorney in court and defend the action; which, in effect, reduces it to a mere *summons*." *See also Chance* v. *Russel*, (1734) Barnes 404, 94 E.R. 976 in which an unsuccessful motion was made to stay proceedings where the copy of the process served on the defendant was not directed to the sheriff of any county.

[32] First Report, *supra*, note 27 at 97.

[33] On the importance of the direction, *see The Palomares*, (1885) 10 P. 36.

The recommendations of the Commission were taken up by Parliament in 1832. In *An Act for Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster*,[36] the modern form of "Writ of Summons" was sanctioned. Form 1 of the Schedule to that Act shows that the writ is directed to the defendant.[37] Only in those cases where it was "intended to arrest and hold any Person to Special Bail"[38] would a Writ of Capias issue. That writ, as Form 4 of the Schedule shows, was directed: "To the Sheriff of ____________" and commanded him, as a writ in Glanvill's time might have done, to take the defendant and "safely keep" him until he should give bail.

The point, of course, is that in England by 1832 it was clear that the sheriff had no duty to "execute" process (and here the word is intended to include "serve") unless a writ was directed to him containing instructions about what he should do. In other words, by 1832 the sheriff was not bound to accept any court process that was not specifically, formally and lawfully addressed to him.[39]

What is there in Canada to support or refute this interpretation of history? In *Whitehead* v. *Fothergill*,[40] a decision from the Upper Canada Court of King's Bench in 1830, service of process was set aside because it had been made by the plaintiff's clerk and not by a sheriff's officer. But the court's conclusion turned on an early statute which provided:[41]

> That the original process for compelling the appearance of the defendant or defendants in any suit hereafter to be brought in his Majesty's court of King's bench, shall be a writ of *capias ad respondendum* . . . a copy of which process, in actions not bailable, shall be personally served on the defendant or defendants by the sheriff to whom the process shall be directed, or his lawful deputy or bailiff . . . .

This decision, then, merely reaffirmed the sheriff's exclusive right to serve process directed to him. The case did not suggest that the sheriff could be compelled to serve process which may have been left with him, but which has not formally been directed to him.

In *Tobin* v. *English*,[42] it was asked[43] ". . . whether any party but the Sheriff or his deputies can serve the writs, summonses, and other proceedings of this Court, which are directed to the Sheriff." The answer given was "no," it being "the invariable practice of the Court" "that the Sheriff alone could perform this duty."[44] Again, there is no suggestion in this case of a duty to receive everything, but only a statement of the exclusive right to execute the process which may be directed to him. This conclusion is supported particularly by the last sentence of the court's reasons for judgment: "We are therefore of opinion that all process out of this Court, *directed* to the Sheriff, is irregular, unless executed under his authority."[45]

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[34] *Supplement to the First Report*, *supra*, note 27 at 122, proposal 14.

[35] *Ibid.* proposal 15.

[36] 2 Will. IV, c. 39 (1832).

[37] And so Millar, *supra*, note 29 could say, at 85, that ". . . by the opening of the nineteenth century it had come about that all non-bailable process might be served by a private person." *See also* H.A. Hollond, "Writs and Bills" (1942) 8 Camb. L.J. 15 at 34.

[38] 2 Will. IV, c. 39 (1832), s. IV.

[39] This part of the sheriff's duty seems to have been clear in Impey's time: *see* Impey, *supra*, note 5 at 54-5: "The sheriff being obliged to execute every writ and process issuing and directed to him by lawful authority . . . ."

[40] [1830] Draper 200.

[41] *An Act to Repeal Part of and Amend the Laws Now in Force Respecting the Practice of His Majesty's Court of King's Bench in this Province*, 2 Geo. IV, c. 1 (1822).

[42] (1846-53) 3 Nfld. L.R. 159 *per* Brady C.J., DesBarres and Emerson JJ.

[43] *Ibid.* at 159.

[44] *Ibid.*

Porter v. *Gardner*,[46] which is not very satisfactorily reported, was decided in 1858. A question there, answered as *obiter dictum*, was whether the sheriff could be required to serve an order for the payment of costs. The opinion stated was that he could not. The Chancellor was inclined "to think that the sheriffs are only bound to serve the process of the court."[47] These words are equivocal. They could as easily mean that the sheriff must act only when directed to do so as they could mean that he is obligated to take and serve anything from the court that might be presented to him, even in the absence of a specific direction that he act.[48]

The case of *Bullen* v. *Moodie*,[49] seems clearly to support the distinction made between directing process to the sheriff and delivering process into his hands for services. The Court said:

> . . . the statute gives no positive direction as to who is to execute the order. I entertain no doubt that the courts or a judge may *direct* the officers of the court whose duty it is to execute their process generally, to carry such an order into effect, nor that such *direction* to the officer may either be embodied in the order or . . . may be appended to it. But in the present case the order does not *direct* the sheriff to take and commit the plaintiff . . . . And [the sheriff] is assumed to have authority to serve writs not directed to him, but to the party against whom they are issued, as in all writs of summons for the commencement of suits.

Of course none of these authorities is local. In any event, special problems have to be faced in British Columbia. The local analysis begins with the *Order in Council*[51] of 1856 for Vancouver's Island. In Chapter V, it was suggested that the order may have been intended to contain an exhaustive statement of the sheriff's court responsibilities. If the order was not intended to be exhaustive, the Colony took the English law in 1858 as it then was. The English law then was the statute of 1832 about uniformity of process. It is that statute that belies the theory that the sheriff in England was obligated to "execute" or to "serve" process where no writ was specially directed to him.

The Order in Council set forth the following duty:

> . . . the said Sheriff for the time being shall . . . execute . . . all the sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands, and processes of the said Supreme Court, and shall make a return of the same, together with the manner of the execution thereof . . . .

If "execute" includes "serve," and it probably did in 1856,[52] then it seems clear that the *Order in Council* stands as a modification or alteration of the law of England as it has been described here, so that from 4 April 1856, part (at least) of what is now British Columbia had sheriffs who could be compelled to serve whatever process might be put into their hands, no matter what direction or address that process might contain.

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[45] *Ibid.* (emphasis added).

[46] (1858) 1 Chy. Ch. 15.

[47] *Ibid.* at 15.

[48] In light of the other authorities, the first possibility is the more likely one. The Crown Solicitor in Saskatchewan who advises the sheriffs does not agree, but it seems from the draft of the manual to be used in that Province that her opinion rests in part on *Whitehead* v. *Fothergill*, *supra*, note 40, and it is not at all clear that she studied the Upper Canada legislation mentioned here in the text.

[49] (1863) 13 U.C.C.P. 126.

[50] *Ibid.* at 135 (emphasis added).

[51] *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council* (4 April 1856).

[52] In earlier times in England, "execution" and "service" were to a large extent used as synonyms. That was the practice even in 1829 when the Commissioners said: "Serviceable process may be executed in all cases by service on the defendant personally." *See First Report*, *supra*, note 27 at 85. It is likely, then, that "execute" was used in this same sense in the *Order in Council*, which includes reference not only to "judgments," "orders" and "writs," but also to "summonses." It is only recently that a clear distinction between "service" and "execution" has arisen: *see*, *e.g.*, *Rex* v. *Holsworthy Justices - ex parte Edwards*, [1952] 1 T.L.R. 410 (K.B. *en banc*).

The *Order in Council* for Vancouver's Island became part of the law relating to sheriffs in the united Province through the operation of *The Courts Declaratory Ordinance, 1868.*[53] But that *Ordinance* was repealed in 1873 by the *Sheriffs Act.*[54] And that *Act* contained nothing which would require the sheriff to receive process for service which has not been directed to him by the Court. No statute since 1873 has imposed the requirement. Supreme Court writs of summons in the Province have never been directed to the sheriff, but instead were[55] and are[56] addressed to the defendant, as they have been in England since 1832. At best then, it was only between 1856 and 1873 on Vancouver Island and between 1868 and 1873 on the mainland that the sheriff—if ever he was—was obligated to receive Supreme Court process for service which contained no direction to him to act. There seems to be no duty today, except in those cases where the requirement is imposed by statute.[57]

Undoubtedly it will be suggested that the sheriff is obligated at law to accept Supreme Court process for service because the government—the Crown—has directed all its employees in sheriff services to act on any process which may come their way.[58] General commands of that kind may have been enough in Glanvill's time to require a sheriff to summon someone whom the King wanted to see, but with the evolution over the centuries of the courts as institutions constitutionally distinct from the executive, whose decision-makers finally won their complete independence with the *Act of Settlement,*[59] the Crown lost its power to make commands touching court process. Parliament won the power, and with Parliament that power remains.

And so it must follow that no matter what the Deputy Attorney General or the director of sheriff services may tell the deputy sheriffs they must do, and although as between employer and employee they must do it, nonetheless at law there can be no obligation, because the Legislature has not spoken on the question.

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[53] Enacted 1 May 1868. There was nothing about service of process in the *Proclamation of 8 June 1859 Constituting The Supreme Court of Civil Justice of British Columbia*, C.S.B.C. 1877, c. 51.

[54] S.B.C. 1873, No. 7, s. 1. Neither the *Supreme Court Ordinance, 1869*, C.S.B.C. 1877, c. 53, nor the *Courts Merger Ordinance*, 1870, C.S.B.C. 1877, c. 54, mention responsibility for services of process. Nor, for that matter, did later statutes, including the *Better Administration of Justice Act*, 1878, S.B.C. 1878, c. 20 and the *Judicature Act*, 1879, S.B.C. 1879, c. 12.

[55] *See Rules and Manner of Proceeding, of the Supreme Court of Civil Justice, for Vancouver's Island*, made 12 February 1857, Form No. 3—Writ of Summons, which began:

> Victoria, by the grace of God, of the United Kingdom of great Britain and Ireland, Queen, Defender of the Faith: To C.D. of ________ in the district of ________ Greeting: We command you—That within sixteen days after the service of this Writ on you, inclusive of the day of such service, you do make, or cause an appearance to be made for you in our Supreme Court of Civil Justice . . . .

Compare this form of Writ of Summons with Form 18, the Writ of Replevin, which began:

> Victoria [etc.]: To the Sheriff of Vancouver's Island, Greeting: We command you, that without delay you cause to be replevied to AB, his goods and chattels (and cattle) to wit: ________, which CD took and unjustly detains, as it is said, and after what manner you shall have executed this our writ, make appear to us . . . .

Amendments to the Rules were made on 26 April 1858. In those amendments, compare the form of Writ of Summons, which was addressed to the Defendant, with the form of Writ of Capias, which was directed to the sheriff.

The Rules, as amended, were adopted for the colony of British Columbia by Order of Court in 1858 under the hand of Begbie J.: *see* R.L.B.C. 1871, No. 27. *See also* Rules of Court, 1880, Form 1, in Appendix (A). Compare that form with Form 73, the form of writ of *Fieri Facias*, in Appendix (F), which was directed: "To the Sheriff of ________, greeting."

[56] *See Rules of Court*, Appendix A, Form 1. Compare the form with Form 42, the form of Writ of Seizure and Sale, which is directed to the sheriff.

[57] *See, e.g., Jury Act*, R.S.B.C. 1979, c. 210, s. 16(2), which is discussed later in this chapter. *And see* Rule 36(1) of the *General Rules under the Bankruptcy Act*, C.R.C. 1978, c. 368, as am. S.O.R. 389/78:

> The sheriff or bailiff of the court having jurisdiction, or such officer as the court directs, shall serve and execute any process or document that the court requires him to serve and execute . . .

[58] It is questionable whether there has been any sort of official direction. There seems to be nothing in writing except a letter dated 25 November 1977 from the director of sheriff services to all regional managers. The letter spells out "the general program which Sheriffs should be doing in all parts of the Province other than the four isolated areas it was never intended that we cover." One part of the program which the director mentions is service of civil process.

[59] 12 & 13 Will. III, c. 2 reprinted in R.S.B.C. 1911, Vol. IV at 64 (1913).

(ii) *In the County Courts*

In England in 1846, an Act was passed for the more easy recovery of small debts and demands.[60] This Act was really designed to reform the county courts, which were of "ancient Jurisdiction," but whose proceedings were then "dilatory and expensive."[61] It was a long Act. One provision[62] gave the reformed courts the assistance of high bailiffs, who were to be appointed and removable by "Order of Court." By section 33, it became the high bailiffs' responsibility, among other things, ". . . to serve all the Summonses[63] and Orders, and execute all the Warrants, Precepts and Writs" issued out of the courts.

On Vancouver's Island, there was a *Small Debts Act, 1859* and later *The County Court Jurisdiction Ordinance, 1866*. The Ordinance was enacted to define the jurisdiction of the county courts under the Act. On the mainland, *The District Court Act, 1866*[64] was passed and with union came *The County Court Ordinance, 1867*.[65] By section 2, and subject to the provisions of the Ordinance, so much of the English Act of 1846 as was applicable to the colony was adopted as the law. By this adoption, British Columbia took the provisions of the Imperial statute relating to high bailiffs. Section 13 of the Ordinance declared that the duties of the high bailiff were to be performed by the high sheriff of British Columbia or by any of his deputies. Thus, it seems clear from this legislation that the sheriff was given the duty to serve process because his counterpart had been given the responsibility in England. Indeed, the sheriff was given a monopoly, limited only by section 6 of the Ordinance which sanctioned service by persons other than "the proper officer of the Court" when this "exceptional service"[66] was "authorized in writing by the County Court Judge in that behalf."[67]

No relevant changes were made by the *County Courts Amendment Ordinance, 1870*[68] or by the *County Court Act, 1883*,[69] but by the *County Court Jurisdiction Act, 1885*,[70] which repealed the Ordinance of 1867,[71] "exceptional service" was abolished. The obligation that the sheriff *qua* high bailiff make service remained. Thus, for a long time in the county courts, the sheriff was the only person who could make service.[72] In fact, it was 1976 before any further amendment was made.[73] In that year, the progeny of section 13 (by then section 20 of the *County Court Act*[74]) was repealed by section 27 of the *Miscellaneous Statutes (Court Rules) Amendment Act*.[75] That *Act* was proclaimed on 15 July 1976,[76] two weeks after the new *Sheriffs Act*[77] came into force. Section 5 of the *Sheriffs Act* declared all sheriffs to be officers of all the courts. The timing of the repeal suggests that the legislators either did not care whether the sheriff was required to receive process from the county courts for service[78] or that they thought—incorrectly—that the duty flowed simply from the designation as court officer.

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[60] 9 & 10 Vict., c. 95.

[61] *Ibid.* preamble

[62] *Ibid.* s. 31.

[63] Provision for the issuance of a summons, rather than a writ of summons was made in s. 59, *ibid*.

[64] None of these three laws can be found in any consolidation or revision of legislation for either of the colonies or for the Province, but they are available in manuscript from the Provincial Archives at Victoria.

[65] R.L.B.C. 1871, No. 95.

[66] This phrase is used in s. 13, *Ibid.*

[67] *Ibid.* s. 6.

[68] C.S.B.C. 1877, c. 47.

[69] S.B.C. 1883, c. 5.

[70] S.B.C. 1885, c. 7.

[71] *See ibid.* s. 2.

[72] By the *Fees Act, 1879*, S.B.C. 1879, c. 16, s. 1, litigants were entitled to tax the costs of mileage and of service where a proceeding in the Supreme Court was delivered to the sheriff for service but returned by him unserved after 10 days if it could be shown that the person to be served was in the sheriff's bailiwick "at any time during such ten days." Section 4 of the *Act* provided: "Nothing in this Act shall allow any proceeding to be served by any party other than the Sheriff, his deputy or bailiff, which cannot now by law be served by some other party." Section 4 became s. 44 of the *Sheriffs Act*, R.S.B.C. 1897, c. 172. Then, curiously, but in a way which gives support to our argument that the sheriff has never had a duty to receive Supreme Court process for service, s. 44 was amended by s. 3 of the *Sheriffs Act Amendment Act, 1914*, S.B.C. 1914, c. 69 to read: "Notwithstanding anything in the *County Courts Act* contained, any person who may serve a writ of summons under the Supreme Court Rules 1906, may serve summonses, orders, judgments, and other processes of the County Court." This section, with a change only in the name of the rules, survived until 1976: *see* s. 44 of the *Sheriffs Act*, R.S.B.C. 1960, c. 355.

[73] *See* the *County Courts Act*, C.S.B.C. 1888, c. 25, s. 24; R.S.B.C. 1897, c. 52, s. 21; R.S.B.C. 1911, c. 53, s. 20; R.S.B.C. 1924, c. 53, s. 20; R.S.B.C. 1936, c. 58, s. 20; R.S.B.C. 1948, c. 75, s. 20; R.S.B.C. 1960, c. 81, s. 20.

[74] R.S.B.C. 1960, c. 81.

This discussion should not be taken to contain a suggestion that the sheriff can refuse to act where a judge of a county court orders him to serve a document. That is another matter. Such orders are infrequently pronounced in any event, particularly when many lawyers believe—perhaps wrongly, at least as far as originating process is concerned,[79]—that it is in their power to delay service of their clients' writs to the time when service will have its greatest impact. But it is clear that the sheriff from 1867 to 1976 was undoubtedly required by statute to serve any county court process which might have been delivered to him, whether or not it was formally directed to him. He does not seem to have the duty today[80] and he can therefore refuse so much of it as he wishes.

(iii) *In the Small Claim Division of the Provincial Court of British Columbia*

Until 1886, what are now called "small claims" fell within the jurisdiction of the county courts in the Province. But with the *Small Debts Act, 1886*,[81] a new course was chosen. New courts, to be called Small Debts Courts, were created,[82] over which magistrates were appointed to preside.[83] Provision was made rather indirectly for service on defendants of originating process,[84] but no particular person was singled out as having the obligation to serve. At best, it can be said that the question of who was to serve was left at large.[85] On the other hand, as section 13 shows, summonses to witnesses could be served "by any person." It is not such a surprise that the sheriff was not specifically mentioned. It may well have been assumed that he would do the job because he was already doing it in the county courts, for some of whose work these new courts were created.

While it is clear that the sheriff was available to serve small debts process, it is equally clear that he was not used much, if at all, to do the work. For some unknown reason, perhaps because there were more of them, constables were preferred, if section 59 and the Schedule of fees to the revised *Small Debts Act* of 1897[86] are any proof. Both the provision and the Schedule gave constables a right to fees without saying that the sheriff was entitled to any fees at all, though the provision, but not the Schedule, suggested that the sheriff might be paid, because it spoke of such "other person as the case may be." That this was work which the sheriff wanted and which was not going to him, and that he had some influence amongst the legislators, is evident from an amendment to the *Act* contained in section 2 of the *Small Debts Act Amendment Act, 1898.*[87] It provided:

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[75] S.B.C. 1976, c. 33.

[76] *See* B.C. Reg. 405/76.

[77] S.B.C. 1976, c. 50.

[78] There is good reason to impose the duty by statute, as demonstrated later in this part of the chapter.

[79] In *Wilkinson* v. *Ferstel*, (1959-60) 30 W.W.R. (2d) 666 (B.C.S.C.), Clyne J. said at 667, almost in passing: "It is the duty of a plaintiff who issues a writ to serve it promptly . . . Defendants and their insurers are entitled to be notified as soon as a writ is issued in order that they may take whatever steps they may consider advisable to safeguard their interests not only as between plaintiff and defendant but also as between insurer and insured."

[80] The only qualification to this opinion may be stated this way. At common law, the sheriff had no duty to serve process that was not specifically directed to him by Crown or court. The *Act* of 9 & 10 Vict., c. 95 and *The County Court Ordinance, 1867*, R.L.B.C. 1871, No. 95 changed that. The *Ordinance* was then repealed. In Chapter IV, it was suggested that the repeal of a statute which changes the common law does not restore the common law. But what other answer is sensible in the present case?

[81] S.B.C. 1886, c. 6.

[82] *Ibid*. s. 2.

[83] *Ibid* s. 1.

[84] The process was called a "summons."

[85] *Small Debts Act, 1886*, S.B.C. 1886, c. 6, s. 4.

[86] R.S.B.C. 1897, c. 55.

> Where a Sheriff has an office within five miles from the place where any process under the 'Small Debts Act' is issued or is to be served, or executed, the same shall be delivered to such Sheriff or his Deputy for service of execution.

There was nothing in this amending Act, in the *Sheriff's Act*,[88] or in the *Summary Conviction Act* of 1897[89] by which the provision could be enforced,[90] so it was not so much a direction as a tool of persuasion. The provision was short-lived in any event. There is no direct evidence of disapproval, but there must have been much dissatisfaction amongst litigants and lawyers, because in 1899 section 2 was repealed.[91] Its replacement, which was carried, with only slight changes in wording, into section 58 of the current *Small Claim Act*,[92] provided:[93]

> Where a Sheriff has his office or has a deputy at the place where a Small Debts Court is held, he shall be given the preference in serving or executing process issued by such Small Debts Court, but this section shall not be allowed to interfere with the speedy service or execution of such process.

No measures were legislated to enforce this preference, just as there had been no way to enforce the earlier monopoly. It is arguable that a modern litigant who does not give the preference, in a case where speedy service by the sheriff was assured (but how could that ever be proven?) might be prosecuted under section 5 of the *Offence Act*.[94] It is doubtful (though one lawyer suggested that it was not) whether service by someone other than a sheriff who was prepared to act quickly would be bad service, because sections 16 and 19 of the *Small Claim Act*,[95] which provide for service of summonses and of summonses to witnesses, respectively, require only that the server in the first case be "an adult literate person other than the plaintiff," and "a person." Those provisions demonstrate that service is good whether it is made by the sheriff or not. The point, simply, is that the sheriff is not required to accept process for service in the Small Claim Division,[96] any more than he is required to do so in the Supreme or County courts.

It is convenient to mention here that many complaints have been made about the preference which section 58 of the *Small Claim Act*[97] provides. It has proven hard for lawyers, and it cannot be any easier for laymen, to persuade some Small Claim registrars that they cannot insist that the sheriff be given documents for service.[98] How can the lawyers prove that service will not be speedy[99] and who defines what speedy service is? As a result the sheriff receives the summonses[100] and many litigants get slow action where speed is arguably most important.

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[87] S.B.C. 1898, c. 15.

[88] R.S.B.C. 1897, c. 172.

[89] R.S.B.C. 1897, c. 176.

[90] It could not, for instance, be done by allowing the sheriff fees even if someone else served the document. Courts in British Columbia would probably have followed the lead of the New Brunswick court in *Drury* v. *Howe*, (1845-48) 5 N.B.R. 588 (S.C.). In that case, a sheriff had applied for an order compelling a constable to pay the sheriff fees which the sheriff lost because the constable had done the work of service. Carter J. said at 591: "We could not have ordered money to be paid to the complainant, for which he has performed no service."

[91] By the *Small Debts Act Amendment Act, 1899*, S.B.C. 1899, c. 19, s. 7.

[92] R.S.B.C. 1979, c. 387.

[93] *Small Debts Act Amendment Act, 1899*, S.B.C. 1899, c. 19, s. 7.

[94] R.S.B.C. 1979, c. 305.

[95] R.S.B.C. 1979, c. 387.

[96] Now the Small Claim Division of the Provincial Court of British Columbia: *see Provincial Court Act*, S.B.C. 1969, c. 28, s. 20; *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 2(2); and *Small Claim Act*, R.S.B.C. 1979, c. 387, s. 1.

[97] R.S.B.C. 1979, c. 387.

[98] It is apparently so difficult that one senior lawyer in the Province described the preference given the sheriff as "a requirement of the Small Claims Act that Sheriffs have to be used for the service of documents."

The preference was granted to sheriffs at a time when they were paid fees for the work they did. It cannot be doubted that it was given to them so that their office would be more profitable and so that, in turn, reputable people could be encouraged to undertake the sheriff's work. Today, with a public service sheriff's office, there is not the same justification for the preference. Any extra money that the preference generates forms part of general revenue. But the public's gain in dollars is more than matched by litigants' loss of faith in the efficacy of the service and ineluctably of the court. Unless a first-rate team of process servers is created for the Small Claim Division, so that the complaints of lawyers and litigants are eliminated, or unless there is a return to a system of entrepreneur sheriffs,[101] the preference should be abolished.[102]

(iv) *In the Appellate Courts*

Rule 3 of *The Court of Appeal Rules*,[103] and section 14 (2) (b) of the *Court of Appeal Act*[104] provide for the service of notices of appeal, but nothing is said, either in the Rules or in the Act about who, if anyone, must make service. The sheriff is neither directed to do the work nor excluded from doing it.

In the Supreme Court of Canada, by section 99 (1) of the *Supreme Court Act*,[105] the process of the court "shall be directed to the sheriff of any county or other judicial division into which any province is divided." "Process" is not limited by definition, so that the director of sheriff services in British Columbia is required to act on any process "directed" to him from the Court, including process containing a specific direction to serve. Absent any direction, absent any duty.

(b) *The Necessity to Impose the Duty by Statute*

It is desirable that the sheriff should be obligated by statute to serve whatever process from the courts may be put into his hands. There seem to be no disadvantages which would follow from the imposition of a statutory duty, but the advantages are numerous.

First, it is wrong that the Crown, so often itself a litigant and so often in any event interested in the outcome of lawsuits, should have the power to decide whether or not its public servants will serve court process either at large or in particular cases. True, the government does not now have an absolute power to control service of process, because it is always open to the courts to order their officers to effect service. However, it is cumbersome, time-consuming and unnecessarily expensive—and a little absurd—to resort to applications to the court when a statutory requirement can so easily be enacted.

Second, someone should always be available to serve process in remote areas of the Province. As it is, in many of the cities in British Columbia and in some of the towns as well, companies of private process servers offer their services to the legal profession and are rewarded with the opportunity to serve process. In Vancouver, at least, where competition among private process servers is fierce, many lawyers now refuse to deliver documents for service to the sheriff because his performance in the past has been so poor,[106] particularly when that performance is compared with the work the private process servers are prepared and are able to do. Common complaints about the sheriff's work on service include these:

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[99] "Fee-for-service" process servers are not used in the Small Claim Division.

[100] Commonly, a plaintiff or his lawyer will prepare a small claim summons and submit it to the registry clerk for issuance. The original summons will be stamped with the court's stamp and returned, but a copy will go straight to the sheriff, who in many places has an office in or near the registry building.

[101] As recommended in Chapter IX.

[102] This is not to say that the sheriff should not have a duty to accept process for service. *See* the discussion of that question later in this chapter.

[103] Authority for making rules for the Court of Appeal comes from s. 28 of the *Court of Appeal Act*, S.B.C. 1982, c. 7.

[104] *Ibid*.

[105] R.S.C. 1970, c. S-19.

(1) he showed no imagination and therefore made no real effort to locate the person to be served;[107]

(2) he would not look during those times of the day when the person to be served was most likely to be at a particular address;

(3) he did not act quickly enough;[108]

(4) he did not report about what he was doing;[109]

(5) he did not report with sufficient completeness to permit preparation of an affidavit in support of an order for substituted service.[110]

These kinds of complaints are not often made about the private process servers because the market economy operates to take work from those who are not productive and to give it to those who are.

In many parts of the Province, notably the settled lands between Prince Rupert and Prince George, and between Prince George and the border with Alberta, there are few or no private process servers, simply because (not surprisingly) it is not economical for them to work there. In the result, if the sheriff is not available, (for whatever reason) litigants or lawyers have to effect service themselves (in those cases in which they are permitted to do so—because there are some cases in which they are not[111]) or have to find someone, somewhere, who is prepared to do the work for them. In practice, the sheriff is available almost everywhere in the Province and he reaches many places by four-wheel drive vehicle or aircraft which might otherwise be inaccessible to litigants. But his availability in any particular place is determined by the sheriff services budget and in areas where it is not considered economical to locate a deputy, process for service is left with members of the

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[106] Service has improved since the decision was taken by sheriff services to appoint "deputy sheriffs" under s. 2 (2) of the *Sheriff Act*, R.S.B.C. 1979, c. 386 to act as "fee-for-service" process servers, but the lawyers are still wary.

[107] This complaint is not new. In the eighteenth century, Blackstone wrote of bailiffs: "But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them, who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seising their prey": *see* 1 Bl. Com. 345. One lawyer from the interior of the Province wrote: "The process servers and or deputy sheriffs used to serve documents make no special efforts to serve the said documents. Numerous instances can be recalled where a Writ had been forwarded to the sheriff's office, one attempt has been made unsuccessfully to serve, and little and no further effort was made to effect service. After the Writ is removed from the sheriff's office at the direction of the solicitor, private process servers have been quite able to serve the same document within a day or two."

[108] One lawyer from Vancouver Island said: "In many instances, we have to wait two or three weeks for a Writ of Summons or Petition to be served despite the fact that the Defendant or the Respondent is resident or working relatively near the Registry." While it is worth noting that the complaint was made, it is perhaps more interesting to remark about the lawyer's expectation. For him, two or three weeks was too long. In other places, lawyers would be delighted with such efficiency.

[109] In one case, where the sheriff was asked to serve a judgment summons issued from the Small Claim Division (the sheriff has a monopoly on service of this process under s. 6 of the *Sheriff Act*, R.S.B.C. 1979, c. 386), the lawyer who delivered the summons heard nothing from the sheriff for six weeks and when he called to make enquiries was told that nothing had been done. As a result, a scheduled hearing date had to be postponed. In many places, lawyers are actively discouraged fom calling sheriff services to check on progress. In fact, one lawyer said: "If complaints are raised about the lack of diligence on the part of the Sheriff and if these complaints offend the Sheriff, the documents filed by the complaining lawyer may find their way to the bottom of the pile and are simply not dealt with in the ordinary course." There may be no truth in the allegation but the fact that the allegation was made is significant.

[110] A court may order substituted service under Rule 12 of the *Rules of Court* and under s. 4 (2) of the *Small Claim Act*, R.S.B.C. 1979, c. 387. Here is the full text of one Affidavit returned to one lawyer in the Province: "I immediately endeavoured to locate and serve the said [Mr. X] at [the address provided by the lawyer]. After finding above address vacant, I have tried to reach [Mr. X] by phone to no avail. A further check with city hall (utilities) shows no [Mr. X] listed in [the city]."

[111] *See, e.g.*, Rule 13 (1) of the *Divorce Rules*: "Service shall not be made by the petitioner or by the petitioner's solicitor." *And see* s. 16 of the *Small Claim Act*, R.S.B.C. 1979, c. 387: "(1) Service of a summons other than a judgment summons, may be made (a) by an adult literate person other than the plaintiff . . . ."

Royal Canadian Mounted Police, who do the work under a loose agreement with the Ministry of Attorney General.[112]

It is undesirable that litigants in remote areas should be left to their own devices in serving process.[113] Service is now the keystone[114] on which every civil action is built and in modern times it is unacceptable that geography should frustrate the attainment of justice. For this reason, it is suggested that the sheriff should have a statutory duty to receive process for service, even if it will mean that his reasonable attempts to serve may take him far into the wilderness.

Third, unless the responsibility to receive process is imposed by statute, it will never be clear whether it is the litigant or the sheriff who must provide information about the person or people on whom service is to be made. In cases where it is beyond doubt that the sheriff is bound to act, (for instance, where a writ of execution is directed to him) "[t]he sheriff himself should make enquiries;" the "Plaintiff is not bound to furnish information."[115] None of the cases concerning execution suggests why the sheriff should have the responsibility for finding the debtor, so that it cannot be said with certainty that the duty to enquire is an inseparable element of the duty to serve, as it seems to be of the duty to execute. There are no cases on this point. But it is suggested, for reasons that follow, that the two functions go hand in hand.

It is frequently said by lawyers that in practice today the sheriff often justifies his failure to serve a defendant or respondent with the remark that he had been given little to go on and that the limited resources available to him did not permit him to make his own investigation. There is little doubt that initiative is sometimes not used. In one incident related by a disenchanted young lawyer, the sheriff was asked to serve X with a writ at 5811 M Street. The sheriff went to M Street, found no place numbered 5811, returned to his office and after some delay reported his findings to the lawyer. In fact, X lived at 5810 M Street, but the sheriff had made no inquiries in the neighbourhood, so that X went unserved and a scheduled hearing date was lost to the lawyer's client.

Private process servers happily work with little information, not only because for them the search can be exciting, but because their profit may increase as an investigation widens. For the sheriff, who has access to a "tracing" unit in the Ministry of the Attorney General, there is not the same incentive. Because he is a public servant, his cheque will not reflect the work he does or the result he accomplishes.

If, because by statute the sheriff acquires the duty to serve process, he also acquires the duty to locate the person to be served even when no information has been supplied to him, then something should be done to limit the breadth of the responsibility to locate. It is suggested that the duty to receive process for service be imposed by the *Sheriff Act*, but the statute should provide that no sheriff is obligated to serve process unless the party at whose instance he is required to act has first provided him with either: (1) the name, age, current address and place of employment of the person to be served together with the name, age, current address and place of employment of that person's spouse, if any; or (2) a statement explaining why some or all of the required information is not available. In this way, litigants and their lawyers will be forced to put their minds seriously to the question of locating the defendant and as a result the sheriff's job of enquiring will be made less onerous. However, in order to ensure that litigants are not frustrated in having service made in cases where the required information is just not known, it is suggested that the statute provide that the sheriff cannot question the statement before making service—if a statement of explanation is made, it must be accepted—, but that its truth or reasonableness may be challenged in any proceeding brought to determine whether the sheriff's duty to serve has been discharged or whether it has been discharged properly.

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[112] In a letter of 25 November 1977 to the regional managers, the director of sheriff services mentioned "the few isolated areas it was never intended that we cover." *See* note 58, *supra*.

[113] In the *Report of the Task Force on Sheriff Services*, (May 1977) at 52 the director of sheriff services was told that the sheriff should retain his process-serving "role" because it made "available a standardized province-wide service to the court system."

[114] *See, e.g.*, *Craig* v. *Kanssen*, [1943] 1 K.B. 256, 262: "failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation."

[115] *Dyke* v. *Duke*, (1838) 4 Bing. N.C. 197, 132 E.R. 764, *per* Tindal C.J.; Park, Vaughan and Bosanquet JJ. concurring. *See also Dean of Hereford* v. *Macknamara*, (1824) 5 Dowl. & Ry. 95 (K.B.).

A fourth reason for imposing a statutory requirement that the sheriff receive process for service is that he will then be better able to order the work that comes to him. Deputy sheriffs were questioned about which of two documents—a Petition for Divorce or a Writ of Seizure and Sale—they would act on first where: (1) the Petition came into their hands first; (2) it had been made clear to them that action on the documents was equally urgent; and (3) there was not time to act on both. Of 14 deputy sheriffs who responded, five said that they would serve the Petition because it came first in time, two said that they would serve the Petition but did not give a reason for choosing it over the Writ, and seven chose the Writ of Seizure and Sale, some suggesting that that was the proper course because the Petition could always be served "substitutionally."

It is not clear which of the three groups of deputy sheriffs was correct in its choice because there are no authorities to give guidance. The point, of course, is that the deputies should not be put in the position of having to make the choice. The duty to receive process for service should be stated by the Legislature but the legislation should specify that as long as applications for orders for substituted service can be made, writs of execution (for which substitution is not possible) should have priority. In time, the judges may want to create their own list of priorities if, as it is suggested later in this paper,[116] they are given the power to administer the court responsibilities of sheriff services.

There is a fifth reason for creating a statutory duty. The legislated duty would mean that all doubt would be dispelled about whether litigants could apply for an order compelling the sheriff to act, in the face of his refusal to do so. Applications for "judicial review" could then be made by petition under section 2 of the *Judicial Review Procedure Act*[117] for relief in the nature of *mandamus*.[118] At present, and as long as the sheriff is not bound by statute or common law to make service when process is delivered to him, litigants must resort to expensive actions at law. A statutory duty would make a summary and sensible procedure available.

The suggestion that the duty to receive process for service be imposed by statute is not novel. Process in the Republic of South Africa,[119] in the Northern Territory[120] and in the States of Western Australia[121] and South

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[116] In Chapter IX.

[117] R.S.B.C. 1979, c. 209.

[118] *See, generally*, R.F. Reid and H. David, *Administrative Law and Practice* (2nd ed., 1978) at 403-17.

[119] *Uniform Rules of Court* (1977), Rule 4 (1) (a): "Service of any process of the court directed to the sheriff . . . shall be effected by the sheriff . . . ."

[120] *Sheriff Act*, 1980, s. 7.

[121] *Rules of the Supreme Court of Western Australia*, Order 82, rule 7 (1): "The sheriff shall, if requested to do so by any party or his solicitor, serve or cause to be served in Western Australia any writ, notice, order, summons or other document issued, made or prepared in or in relation to any cause or matter in respect of which personal service is required by statute or by any rule or practice of the Court."

Australia[122] and in the federal courts of the United States of America[123] is served by officers—the sheriff in the first four places; the marshal in the last—who are charged by statute with the responsibility of service. Since 1975 in Newfoundland, there has been unproclaimed legislation to the same effect.[124]

The suggested statutory duty could be imposed two ways. First, each process could include a direction from the court to the sheriff in which the requirement to serve is spelled out. This method would approximate the way in which the duty to levy execution is now imposed in this Province.[125] It is a clumsy method and may lead people to conclude that only the sheriff may serve. The second method is simply to enact in the *Sheriff Act*[126] a provision in these words: "The sheriff shall serve all process delivered to him." "Process" should be defined to mean: "any court paper lawfully issued or filed in a proceeding in any of the courts in the Province."[127] This wording would not prohibit others who are not sheriffs from sharing in the work.

(c) Undertakings to Serve Process

If the sheriff undertakes to serve process, he may be held to be responsible if something goes awry even though at law he was under no duty to receive it for service. There is little law on the subject. An old Irish decision and a recent judgment from this Province provide the only guidance. Still, the rules seem to be clear.

In Gamble v. *Barr,*[128] a "civil bill officer" appealed against an award to the plaintiff of damages for the officer's neglect "to effect service of two interpleader civil bills in time for the next ensuing Court after the seizure."[129] The officer had received the bills but had mistaken them for process of a different session and put them aside, and when service was finally made it was too late. As a result (it was a potential result of which he was ignorant), the plaintiff lost his interpleader remedy. Dodd, J. said:[130]

> But the process server is an officer of the Court, and is bound to know its rules so far as they concern him. If he had looked at them he would have seen and known the time for service. He was bound also to look at the process and see where it was for, but in breach of that duty he did not look at it, and put it in a drawer, thinking it was for Banbridge sessions. *He undertook the responsibility of serving it on the proper person within the proper time.*

It is evident from this passage that a process server will be bound according to the undertaking, if any, which he gives when he accepts a document for service. And, it seems, to that undertaking will be applied the ordinary principles of negligence. As Dodd, J. said:[131]

> . . . I apprehend that the law as to negligence of a process server is the same as that which applies to the negligence of a solicitor—that is, the onus is upon the process server to prove that the plaintiff suffered no loss by his neglect.

That the ordinary principles of negligence apply is confirmed by *Rempel* v. *Parks,*[132] a recent decision of the Supreme Court of this Province. There, on

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[122] *Rules of the Supreme Court of South Australia.*

[123] *See* C.A. Wright and A.R. Millar, *Federal Practice and Procedure* (1969) ss. 1089: "Rule 4 (c) [of the Federal Rules] requires that service of process be made by a United States marshal, his deputy, or some other person specially appointed by the court."

[124] *Sheriff's Act*, S.N. 1975-76, No. 73, s. 11 (1): "It is the function and duty of office of the Sheriff (a) to serve writs, summonses, motions, pleadings and other documents of process issuing from those courts within the province which have been traditionally been served by or on behalf of the Sheriff, or documents arising out of any matter before such courts."

[125] *See* discussion of the duty in Chapter VI.

[126] R.S.B.C. 1979, c. 386.

[127] There is a model of sorts in the *General Rules Under the Bankruptcy Act, supra,* note 57.

[128] (1910) 44 Ir. L.T. 204.

[129] *Ibid.*

[130] *Ibid.* at 205 (emphasis added).

[131] *Ibid.*

[132] [1982] 3 W.W.R. 670.

May 27, a solicitor had delivered a writ of summons to the sheriff for service. The writ was due to expire if not served before August 20 the same year. The sheriff attempted to serve the document on June 17, July 16, July 31, and on August 5, 11, 13 and 14. At the trial, Grady, the deputy sheriff, testified that:[133]

> . . . he was aware of the imminent expiry of the writ, that documents close to expiry dates are kept separately from others so that the dates can be met, that the frequency of the attempted service increased as the expiry date approached, and that as a general principle, a sheriff's officer such as himself would alert a solicitor by telephone in these circumstances to avert the expiry of a writ. However, notification is, he says, only a matter of courtesy. He does not suggest that he did not know the potentially serious consequences attendant upon the failure to serve within the 12-month period.

At the time of the alleged wrong, section 41 of the *Sheriffs Act*[134] provided that a party could call for return of a document delivered to the sheriff which had not been "fully and completely served within ten days after such delivery." Mr. Justice Meredith concluded that the solicitor and the deputy were equally at fault:[135]

> The defendants [His Lordship must have meant "The third parties"] say that Mr. Wong [the solicitor] could have required the re-delivery of the unserved writ and had it served by other means, or renewed. This, it is alleged, was his responsibility: I agree with that submission. But Mr. Grady was fully aware that Mr. Wong relied upon him to serve the writ or notify Mr. Wong before the writ expired that it had not been served. Under these circumstances, I conclude that there devolved upon Mr. Grady a duty to inform Mr. Wong of the circumstances before the writ expired. His failure to do so constitutes negligence, which caused damage to Mr. Wong, damage that was clearly forseeable.

There is no equivalent for section 41 in the current *Sheriff Act*.[136] For that reason, it seems clear today that much, if not everything, will turn on the particulars of the request for service made of the sheriff and on the breadth of the undertaking, if any, which the sheriff gives. A prudent lawyer will tell the sheriff in his letter of request the date by which service must be made before expiry and will describe the consequences of a failure to serve within the period described. Arguably, depending upon the weight given to the *Gamble* case,[137] even the failure to mention consequences may not be fatal.

There is no common law rule or statutory provision requiring a sheriff to serve a document promptly, in a case (for example) where the document itself will not expire but where the event for which service is sought may pass before service is made. Service of a subpoena compelling a witness to attend court to give evidence is a case in point. It seems that the sheriff's potential liability for failure to serve will depend entirely on the nature of the undertaking he gives when he accepts the document. Because he has no duty to accept a document, he may properly refuse to give any undertaking at all.[138] In that case, a prudent lawyer will look elsewhere in the marketplace, if he can, for a process server. If no others are available, then the party wishing service may have no practicable means of doing what must be done.

What, though, of the cases in which the sheriff has a monopoly on service? For example, arguably no person other than the sheriff has a right to serve a subpoena to debtor.[139] This kind of subpoena is a document used by a judgment creditor who seeks to bring his debtor before the court or before an examiner on a particular day (pursuant to Rule 42 of the *Rules of Court*) to explain his failure to satisfy the judgment.

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[133] *Ibid.* at 671.

[134] R.S.B.C. 1960, c. 355.

[135] *Supra*, note 132 at 672.

[136] R.S.B.C. 1979, c. 386.

[137] *Supra*, note 128.

[138] Obviously the sheriff should not give an undertaking when he has on hand sufficient documents directed to him by the court to occupy fully his attentions. It will be for the Legislature, or the judges if they take the initiative, to determine priorities if a duty to serve is superimposed on the duty to execute now imposed by the wording of writs issued in Forms 42 through 46 of the *Rules of Court*.

The subpoena is not directed to the sheriff. Rather, as its name implies, it is directed to the debtor, is signed by the creditor or his solicitor and is issued out of the court registry in which the examination is to take place[140]. If the sheriff has a monopoly on service and if it is correct to say that he is not obligated to accept any document tendered to him unless the document itself directs him to serve it, then a creditor may have no certain way of making the required service and therefore no certain way of taking advantage of the procedure prescribed by Rule 42.

If, as suggested earlier, the sheriff is directed by statute to accept court process for service or if, short of a statute, the courts begin, by their rule-making power,[141] to command in the processes themselves that the sheriff—as their officer—serve, what should be the extent of the responsibility? It does not seem sensible to impose an obligation other than that the sheriff should act reasonably in all the circumstances. What is reasonable in any case will obviously depend on those circumstances and may depend on the amount or quality of the information supplied to the sheriff at the time of the request by the party wishing service to be made. In an earlier part of this chapter, the question of whether any information should have to be supplied was discussed.

It would be sensible to impose a duty on the sheriff to return the document on demand (allowing a reasonable time to bring the document back into the office from the field) and, in any event, to report periodically, say after 14 days have passed from acceptance by the sheriff of the document and each 14 days thereafter. The report, to be made in the form of an affidavit to be delivered to the party requesting service and filed with the court in complete discharge of the obligation, would describe the efforts made toward service and would be available for use on an application for an order for substituted service. As each report is filed, the party who requested service could decide whether an application should be made or whether the document sent in for service should be withdrawn from the sheriff's office and placed elsewhere for action. Doubtless the reporting requirement would add something to the cost of each service, but at the same time it would provide the taxing officer with a means of gauging whether the cost of a private process server is justifiable in any particular case. In this way, in the long run one of the costs of litigation might be reduced.[142]

2. CRIMINAL PROCESS

(a) Service of Subpoenas

In practice, deputy sheriffs in British Columbia serve subpoenas in criminal cases pursuant to sections 629 and 455.5 (2) of the *Criminal*

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[139] Section 6 of the *Sheriff Act*, R.S.B.C. 1979, c. 386 provides:

> No person other than a sheriff or a person appointed under section 2 (2) shall serve or execute a judgment summons . . .

The present "subpoena to debtor" is the modern version of the judgment summons. If the identity of these two procedures is admitted, then the sheriff's monopoly is confirmed. If the identity is challenged, then the creditor will not face the difficulty described in the text. In the Small Claim Division of the Provincial Court of British Columbia, "judgment summonses" are still in use: *see* s. 40 of the *Small Claim Act*, R.S.B.C. 1979, c. 387.

[140] *See* Form 48 in Appendix A to the *Rules of Court* and *see* s. 87 of the *County Court Act*, R.S.B.C. 1979, c. 72.

[141] *Court Rules Act*, R.S.B.C. 1979, c. 77, s. 3, *as am.* by S.B.C. 1982, c. 46, ss. 13, 14.

[142] It is the current practice of the taxing officers in the Province to allow nothing more for the cost of service of process than would be allowable to the sheriff under Schedule 2 of Appendix C to the *Rules of Court*, unless evidence is adduced which proves that the sheriff was not available, for whatever reason, to do what he was asked to do: *see Turecki* v. *Turecki*, Vancouver Registry No. D830057, December 9, 1981.

Code.[143] As peace officers, they could,[144] but in practice they do not, serve summonses issued by justices under section 455.3 of the *Code*. Subpoenas, according to section 627, "may be in Form 11." That form, and section 628, confirm that subpoenas are not "directed" to the sheriff as a peace officer for service. The form includes these words:

> To E.F., of
>
> Whereas A.B. has been charged that . . . and it has been made to appear that you are likely to give material evidence for (the prosecution *or* the defence.
>
> This is therefore to command you to attend before . . ."

Section 628 (1) provides in part:

> A subpoena shall require the person *to whom it is directed* to attend, at a time and place to be stated in the subpoena, to give evidence . . . (emphasis added)

It is clear, therefore, that the sheriff has no more duty to receive subpoenas for service in criminal cases than he does to receive documents in civil cases which are not specifically directed to him by the court.

By section 629 (1), subpoenas must be served in accordance with section 455.5 (2). That subsection provides:

> A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his last or usual place of abode with some inmate thereof who appears to be at least sixteen years of age.

There are no authorities which would suggest what a sheriff must do before he could properly say that the person to be served could not "conveniently" be found. Is it "convenient" not to serve someone personally simply because the cost of finding him is excessive, in the opinion of the sheriff, because finding him would take too much time, or because it is too troublesome to travel the distance required?

Recently, deputies in British Columbia were admonished by the sheriff not to leave subpoenas with "inmates" at places of employment, those places not being "abodes."[145] Whether "abode" is a word for these times and whether places of employment ought to be sacrosanct are questions to which attention should be paid. "Ordinary place of residence" is probably more easily comprehensible than is "abode." And it may not now be as unfair to employers as it was once thought to be to ask them to bear the cost of interruptions resulting from attendances by the sheriff to serve subpoenas.

(b) The Crown Counsel Sheriff

It is convenient here to address the question of whether it is desirable, for the sake of convenient administration, for the government to assign deputy sheriffs to work in the offices of provincial Crown Counsel for the purpose of assisting with service of subpoenas on provincial Crown witnesses. It is not now the practice to do so, but adoption of a plan of this kind should be discouraged. In Vancouver at present, a staff witness notifier is permanently employed in the Crown office on Hornby Street.[146] This notifier has no duties other than to co-ordinate service as between individual prosecutors and the sheriff, whose offices are at The Law Courts, by ensuring that witnesses can be located and that they are served within the time required. At the Main Street Crown office,[147] several witness notifiers work with the prosecutors and co-ordinate service of subpoenas with uniformed sheriffs who have offices in the same building but which are apart from the suite of rooms assigned to the Crown. This is referred to by sheriff services as "Witness Administration."

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[143] R.S.C. 1970, c. C-34.

[144] *Ibid.* s. 455.5 (2).

[145] Apparently a proposed witness at a trial in the Provincial Court had persuaded the judge that he should not be held to be in contempt of the court for not appearing in answer to a subpoena left with a co-worker.

[146] From which criminal cases to be heard in the superior courts are prepared.

[147] In the Provincial Court building.

There is no reason why the Crown, as a party to criminal cases in the Province, should not have the benefit of the experience of deputy sheriffs in locating and serving witnesses. Accused persons do and should continue to have the same benefit. But it is undesirable that there should be established a working relationship between Crown and sheriff which is so close that it may lead members of the public to believe that the Crown enjoys an unfair advantage in the trial process. In any event, it seems plainly undesirable that the person on whom the court will call as its officer in the event of disruption in the courtroom should be the same person who may be seen by members of the public, at least at the Main Street office, to have been striding through the office of Crown Counsel. The necessarily separate roles of court and Crown tend to be muddied when they appear to share the same officer.

In order to avoid even the possibility that the public will perceive the judges' officer also to be the Crown's officer, consideration ought not to be given to the employment of the sheriff in Crown offices and arrangements should be made now to ensure that deputy sheriffs will not regularly be seen in those offices. Undoubtedly, practical problems for the Crown will result from a further dissociation of Crown and sheriff, simply because the Crown relies so heavily on the sheriff for service. But there is no reason why the Crown cannot supply the sheriff in his own office with its list of people to be served, just as accused persons are required to take their place in line in the same office. If the Crown finds that the sheriff is too distant or that other practical problems result, then it will have to consider the advisability of employing its own officers to effect service, as long, of course, as they are "peace officers" within the meaning of the *Criminal Code*.[148] In short, it may be necessary to give the work to another body of officials or to return the work to the police. As it is, the police are frequently given the work when quick service is necessary.

This problem of use by the Crown of the sheriff is another illustration of the consequences of the decision taken in the mid-1970's in British Columbia to employ the sheriff generally as a sort of "justice administration" officer, without regard to the need to ensure that there be no melding of executive and judiciary. If, in order to ensure that the integrity of the judicial system is not undermined, it is necessary for the Crown to re-employ over-trained policemen to do the jobs from which the sheriff was supposed to free them, then that is the price which must be paid. The alternative is to accept a justice system which bears only some of the traditional hallmarks of judicial independence.

3. AFFIDAVITS OF SERVICE

(a) A Duty

It is not clear whether a deputy sheriff who has effected service of a document is bound to swear an affidavit in which he describes what he has done. In *The King* v. *Rudge*,[149] an attachment was granted by the Court of King's Bench against a bailiff who refused to make an affidavit of the service of a subpoena. The Court is reported to have said:[150]

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[148] R.S.C. 1970, c. C-34.

[149] (1763) 1 Bl. W. 432, 96 E.R. 246. Hist. Records of Aust'l., Series I, Vol. XV, pp. 293-4 apparently contains reference to a case in which the question of affidavits was raised, but this volume was not available for the purpose of this study.

[150] *Ibid.* at E.R. 247.

> For a bailiff is in a very different situation from another man, being an officer of this Court; and if such refusals were justifiable, and if it were left to the bailiff's option, to prove or not to prove the service at his pleasure, parties who apply for justice would be in a very unsafe situation.

The case seems to support the proposition that an affidavit must be made on request. If so, there is a lot of sense in this decision — so much sense that it may be desirable to incorporate the principle into a statute or Rule of Court so that the duty is made clear to everyone.

(b) The Form

Rule 11 (7) of the *Rules of Court* provides that: "An affidavit of service or delivery shall state when, where, how and by whom service or delivery was effected." Provision is made in Rule 11 (12), presumably in the interests of saving costs, for a sheriff (the right is extended to no one else) to give a certificate of service or delivery rather than an affidavit. The certificate to be signed is prescribed in Form 5 of Appendix A to the *Rules*. It is a simple certificate, which need not be sworn before a commissioner for taking oaths or before a notary public, which requires the deputy sheriff to say when and where he "left a copy of this document" and with whom. At least one lawyer has complained that the certificate is inadequate in form because it is not suitable in cases where the deputy is called upon to leave more than one document. That complaint seems to be ill-founded in light of Rule 4 (1) of the *Rules of Court*, which provides:

> The forms in Appendix A shall be used where applicable with such variations as the circumstances of the proceeding require.

Obviously this sub-rule would permit deputies to alter the form of the certificate in order to show that more than one document was left. Each of the documents left should be described so that no one is left in doubt about what was served.

Equally, it should not be wrong for deputies to alter the form of certificate in order to show that conduct money has been left with the document. Not infrequently, examiners under Rule 42[151] are asked to report to the court about the failure of a debtor to respond to a subpoena to debtor in cases in which it is not clear from the certificate of the sheriff that conduct money has been left. The examiner is bound to report in Form 85 of Appendix A to the Rules. That form requires him to say that the subpoena ". . . was served in accordance with the provisions of Rule 42 (29) . . . " Under Rule 42 (29), with the subpoena ". . . shall be tendered the expenses the person served would be entitled to were he required to attend the Court as a witness." Unless the sheriff's certificate contains a statement that conduct money has been left, the examiner cannot report in the prescribed form. He or she could, of course, alter the form of the report to show that proof of service of conduct money had not been made. In that case, before going to Court for an order for committal on the strength of the report, counsel would have to return to the sheriff for (presumably) an affidavit in which it is sworn that the conduct money was tendered. It is much more sensible simply to amend the form of certificate to provide for insertion of particulars about delivery of conduct money.

(c) Attempted Service

It is not uncommon for any process server to find he is unable to locate the person on whom he is supposed to serve a document. In such a case, an affidavit of attempted service is usually sworn. Under Schedule 2 of Appendix C to the Rules of Court, a sheriff is entitled to have $25.00 for:

> Receiving, filing, serving on one person and returning any process together with an affidavit of service or attempted service.

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[151] *See* note 139 *supra*.

He may also have $5.00 for each additional party served at the same address and $10.00 for each of any others served at other addresses. Where a party is served, the sheriff's affidavit should comply with Rule 11 (7) or he should give a certificate. There should be no trouble with the certificate if the blank spaces in the form are correctly completed.

Where, however, service is not made, the contents of the affidavit take on a larger importance. The contents are important because the party requesting service may wish to use the affidavit as the basis for, or as one piece of evidence in support of, an application under Rule 12 for an order for substituted service. Guidelines were issued by sheriff services in July 1980 in order to assist the deputies in making helpful affidavits. These guidelines are based on the reasons for judgment of His Honour Judge van der Hoop, sitting as a local judge of the Supreme Court of British Columbia, in *Credit-Foncier Franco-Canadien* v. *McGuire et al.*[152] There, Judge van der Hoop deplored the practice of counsel who brought unsupported applications for orders for substituted service and then said:[153]

> Before a judge can grant an order for substituted service . . . he must be supplied with facts establishing that personal service cannot be usefully effected or will involve too great a cost. The applicant must show that reasonable steps have been taken to locate the party to be served and, if he has been located, that reasonable efforts had been made to effect personal service.

The guidelines parrot this passage and contain the following instructions:

(1) Set out in some detail the attempts and enquiries that have been made to effect personal service.
(2) Identify the document to be served with the party to be served.
(3) Do not express any opinion:
  (a) that the person to be served is evading service;
  (b) that the document to be served can only be served substitutionally;
  (c) concerning the type of substitutional service.

These instructions, which all counsel would do well to read, are an attempt to respond to another passage from the *Credit-Foncier* case in which van der Hoop L.J.S.C. had said:[154]

> A commonly recurring problem is the affidavit of a sheriff's officer which states that the officer attended at the home of the party to be served on one or a few occasions, that the party was not home, that the officer left his card with instructions for the party to telephone or come to the officer's place of business, that the party failed to do so and that the party is therefore evading service. There is no requirement for a party to assist or co-operate with the sheriff's officer in order that service may be effected, and the opinion that a party is evading service is one that unless adequately supported by facts will be rejected by the judge. The statement "they also serve who stand and wait" was not made with this context in mind.

It is evident from these words that the court will not see a person's unwillingness to assist the sheriff by taking up the invitation to call as sufficient ground for an order for substituted service. Whether it is useful for the deputies to extend the invitations is another matter. It may well be that responsible citizens will make the call but a person who does not share the community's sense of responsibility cannot necessarily be said to be evading service. These people are unlikely even to heed actions such as those of a former "fees" sheriff in the Interior who, faced with a huge territory to service, would regularly mail notices to persons who were to be served which contained a direction that they meet him at a convenient place and which concluded with the ominous words

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[152] (1979) 14 B.C.L.R. 281 (S.C.); *see also Malkin & Pinton*, (1978) 5 B.C.L.R. 285 for similar comments on unsupported applications under Rule 12. *And see Re DeCespedes*, [1937] 2 All E.R. 572.

[153] *Ibid.* at 283.

[154] *Ibid.* at 284.

(whose source seems to be England): "HEREIN FAIL NOT."[155] This is not a practice to be recommended, for the reason advanced by Judge van der Hoop: co-operation cannot be insisted upon.

4. WHEN CAN SERVICE BE MADE?

(a) Days

A deputy sheriff who undertakes to attempt service by a certain day should know that Rule 3 (1) of the *Rules of Court* provides that:

> (b) service or delivery of documents effected after 4 o'clock in the afternoon shall be deemed to have been effected on the next day that is not a holiday.

"Holiday" is defined in section 29 of the *Interpretation Act*[156] to include:

> (a) Sunday, Christmas Day, Good Friday and Easter Monday;
> (b) Dominion Day, Victoria Day, British Columbia Day, Labour Day, Remembrance Day and New Year's Day;
> (c) December 26; and
> (d) a day fixed by the Parliament of Canada or by the Legislature, or appointed by proclamation of the Governor General or the Lieutenant Governor, to be observed as a day of general prayer or mourning, a day of public rejoicing or thanksgiving, a day for celebrating the birthday of the reigning Sovereign, or as a public holiday.

Service may be made on any day, including any holiday, except on Sunday. The proscription against service on Sunday is contained in section 64 of the *Supreme Court Act*,[157] which provides:

> (1) A person shall not serve or execute on Sunday a writ, process, warrant, or order, except in habeas corpus proceedings, a writ of attachment or a special order for the detention of a defendant.
> (2) Service of a writ, process, warrant or order on a Sunday is void and a person serving or executing it is as liable to the party grieved as if he had acted without a writ, process, warrant or order at all.[158]

Thus, a sheriff who on Sunday serves process of the sort listed in the section is liable to be prosecuted under the *Offence Act*.[159] At the same time the sheriff may find himself defendant in actions brought against him by both the party who wanted service effected and the party who was to be served. The first might sue (for example) if the sheriff had expressly or impliedly undertaken to serve within a specified period but had left Sunday as the last day within the period to do what he had undertaken to do. The second might sue for damages for trespass to land or to the person.[160]

Some documents are apparently excluded from the section 64 proscription. One such document is a notice of appeal, at least according to *Regina* v. *Humphreys*.[161] In that case the court described at some length the origin and theory of Sunday as a *dies non juridicum* but concluded that a notice of appeal from an acquittal on a charge under the breathalyzer section of the *Criminal Code*[162] is not a "process:"

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[155] This story is recounted by a former Interior counsel who knew the sheriff well.

[156] R.S.B.C. 1979, c. 206.

[157] R.S.B.C. 1979, c. 397. This provision has its origin in section 6 of (1676) 29 Car. II, c. 7. *An Act for the better Observation of the Lord's Day, commonly called Sunday*. The precision with which the current language tracks the language of its progenitor is astonishing. The Carolinian statute, with its strict prohibitions against commercial activities on Sunday, is of course the "modern" father of all Lord's Day legislation. One wonders, in these days of Sunday shopping, whether section 64 is still justifiable. There are a number of common law authorities which reiterate the special character of Sunday as a *dies no juridicus: see*, *e.g.*, *Boome* v. *Swan*, (1766) 6 Brown; *R.* v. *Myers*, (1786) 1 T.R. 265, 99 E.R. 1086; *Lyford* v. *Tyrrel*, (1794) 1 Anst. 85, 145 E.R. 807; *Wells* v. *Gurney*, (1828) 8 B. & C. 769, 108 E.R. 1229; *In the Matter of Alfred Eggington*, (1853) 2 El. & Bl. 716; 118 E.R. 936; *Foster* v. *Toronto Railway Company*, (1900) 31 O.L.R. 1; and *Rosa* v. *Kellington*, [1928] 2 W.W.R. 399 (Sask. C.A.). In the Republic of South Africa, there is more flexibility in the rule about Sundays. By Rule 4 (1) (c) of the *Uniform Rules of Court*, service may be made on Sunday if a judge has so ordered. Perhaps consideration ought to be given in this jurisdiction to the adoption of a similar rule, if it is not decided that the ancient rule should be abolished altogether.

[158] Arguably the service is void even where the party served consents to Sunday service: *see Taylor* v. *Phillips*, (1802) 3 East. 155, 102 E.R. 556.

[159] R.S.B.C. 1979, c. 305.

[160] *See* text *infra*.

[161] (1972) 5 C.C.C. (2d) 466 (N.S.Co.Ct.). As far as service of criminal process on holidays is concerned, reference should be made to s. 20 of the *Criminal Code*, R.S.C. 1970, c. C-34.

> A notice is not ordinarily part of the "process" of a Court. It is not like a writ, a summons or a subpoena, which is issued by the Court and bears the authoritative character of a command of the Crown or the Court. A notice is, in essence, a written statement or letter from one party to another letting the latter know what the former proposes to do. It does not emanate from the Court, nor in most cases, need it pass through the Court, if it has performed its function. A notice issued under *Criminal Code*, s. 722 [rep. and sub. 1968-69, c. 38, s. 86; now s. 750] must indeed eventually be filed in the Court with proof of service where the prosecutor is the appellant and must be served upon the Clerk of the Court where the defendant is the appellant, but the notice does not have any official character or effect in either case until it is filed in the office of the Clerk of the Court or served upon him, as the case requires. Until that time it is a private document . . . Certainly it does not become Court process until it gets into the office or hands of the Clerk of the Court.

If this decision accurately states the law, then it exists as further evidence of the need to ensure that deputy sheriffs in this Province have ready access to legal advice. Otherwise, they will have no means, other than speculation, by which they can try to answer the sorts of questions which this case raises.

(b) Hours

There seems to be no doubt that process may be served at any hour of the day.[163] Indeed, the principle seems to have been clear for a century and a half because in 1822 in *Priddee* v. *Cooper*,[164] the court refused to set aside service of a *capias ad respondendum* which had been made after ten o'clock at night. Interestingly enough, the court accepted an argument advanced by Serjeant Vaughan that a distinction should be drawn between "notices" and "process" and concluded that unless process ". . . could be served at any hour, there might be no means of catching the Defendant."

5. WHERE CAN PROCESS BE SERVED?

It seems to be commonly accepted that a process server, whether a sheriff or someone else, has no authority to break open premises, whether commercial or otherwise, for the purpose of effecting service. For that reason, the rules about entry succinctly stated in *Semayne's Case*[165] with reference to *execution* of process are not applicable. Of course a process server may search for the party to be served on lands or in premises to which he has been invited, or to which members of the public are ordinarily permitted access, but if no invitation has been extended and the lands or premises are not open to the public, an entry for the purpose of serving process will be actionable as a trespass to land.

There seems to be no doubt now that process may validly be served within the precincts of the court. At one time, such service was considered to be contemptuous,[166] but that rule was rejected in *Poole* v. *Gould*[167] and the current rule that service within the precincts of the court is neither contemptuous nor void was stated in *The King* v. *Jones; Ex parte McVittie*.[168] Lord Hewart, C.J.,[169] with whom Avory, J. agreed, was not prepared to

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[162] *Ibid.* at 469-70.

[163] In the Republic of South Africa, process must be served "as near as possible" between 7:00 a.m. and 7:00 p.m.: see Rule 4 (1) (b) of the *Uniform Rules of Court*.

[164] (1822) 1 Bing. 66, 130 E.R. 27. For a more modern statement of the same principle, *see Murray* v. *Stephenson*, (1887) 19 Q.B.D. 60.

[165] (1605) 5 Co. Rep. 91a, 77 E.R. 194.

[166] *Cole* v. *Hawkins*, (1738) Andrews 275, 95 E.R. 396. The court left open the question of whether the service was void.

[167] (1856) 25 L.J. Ex. 250, 156 E.R. 1133.

[168] [1931] 1 K.B. 664.

[169] *Ibid.* at 670.

". . . say that there may not be circumstances in which the service . . . may amount to 'contempt,' but MacKinnon, J.[170] could not "conceive what those circumstances could be." It is unlikely that a properly trained deputy sheriff would effect service of process within the precincts of the court in such a way that his behaviour would amount to contempt, but (with due respect for Mr. Justice MacKinnon) it is also not impossible to conceive of a situation in which an ill-trained[171] or inexperienced deputy could act so thoughtlessly that his actions would be contemptuous. If they were, he could be dealt with summarily by the court, as one of its officers.[172]

Service of process within the precincts of the provincial Legislature is probably valid, though nonetheless a breach of the privilege of the House. There are no recorded instances of complaints about such service in this Province and so the only guidance on the subject may be found in what Master Jacob has recently said in the book of practice which he edits:[173]

> So far as concerns the House of Commons the Committee of Privileges has decided that it is a breach of privilege to serve a summons within the precincts of Parliament on a day when the House is sitting, even if at the time of service the House is not in session.

6. TOUCHING

While it may be a trespass to serve or to attempt to process on land or in premises to which no invitation for entry has been extended to the process server, it is not necessarily wrongful for a process server to touch the person who is to be served. In 1830, in *Harrison* v. *Hodgson*,[174] which concerned an action brought for damages for assault and false imprisonment, the court was ". . . not prepared to say that it may not, under particular circumstances, be necessary and lawful . . . " to touch a party in order to serve him with process. In a more recent decision, ***Rose*** v. ***Kempthorne***, Lord Alverstone, C.J. said:[175]

> In this case, as the appellant had before him the respondent, whom he was entitled to serve personally, and who would not receive the document, I think that the touching the respondent was not unnecessary under the circumstances. All the appellant did was to endeavour to place the document in the fold of the respondent's coat, and there was really no evidence that the appellant touched the respondent further than was necessary to bring the document home to him.

Obviously deputy sheriffs must exercise proper judgment in deciding whether a touching is required;[176] use of force would not seem to be justifiable in any case. This need to exercise good judgment in potentially volatile situations underscores the need for properly trained and temperamentally sound deputies.

7. EFFECTIVE PERSONAL SERVICE

Rule 11 (2) of the Rules of Court provides that service of a document is effected on "(a) an individual by leaving a copy of the document with him." This paper is not concerned with the question of whether personal service is necessary in any particular circumstance or whether personal service is desirable and ought to be preferred to less costly but perhaps less certain methods. Rather, the concern here is with what must be done to ensure that someone who must be served personally has been served personally within the meaning of the law.

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[170] *Ibid.* at 671-2.

[171] In 1975, one writer in Australia described "a severe deficiency in the training of process servers" and said that it was a deficiency which "urgently" needed to be remedied: *see* J. Willis, "Of Process Servers, Default Summonses and the Judicial Process" (1975-76) 10 Melb. U.L. Rev. 225, at 235. Undoubtedly process servers here could be better equipped to do their work.

[172] *See* Chapter VI.

[173] 1 *The Supreme Court Practice, 1979* at 1091. *See also* C.J. Miller, *Contempt of Court* at 229. *Quaere* whether service at Government House is not void: *see, e.g., Attorney General* v. *Dakin*, (1870) L.R. 4 H.L. 338.

[174] (1830) 10 B. & C. 445, 109 E.R. 515.

[175] (1910-11) 103 L.T. 730.

[176] *Ibid.* at 731.

Hope v. *Hope*[177] is usually cited whenever an effort is made to describe the object of the service of process. In that case, Lord Cranworth, L.C. said:[178]

> The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.

It follows from this object (and the courts have recognized) that it is not necessary that a process server actually place the process to be served into the hand of the party to be served. Thus, one writer has said:[179]

> It is not necessary to force the copy writ into the hand of the defendant, it is sufficient if it is offered to him. Thus, in Bell v. Vincent 7 D. & R. 233, where the defendant refused to take the writ, which was thereupon placed upon his shoulder by the process-server, the service was held good.

There is no reason to doubt the accuracy of this statement of the law, because it accords with the report of the case cited. And indeed, as other cases show, it is not necessary even to touch the document to the person to be served.[180] Thus in *Orazio* v. *Ciulla*,[181] after a characteristic review of the decisions, Kirke Smith, L.J.S.C. said:[182]

> The essential ingredient, as I see it on the authorities, is that the process delivered to the defendant must be so delivered under circumstances which enable the court to conclude that he knew, or reasonably should have known, what it was, or, . . . that he knew the document was a writ, issued against him by the plaintiff, and knew, in addition, the general nature of the claim therein advanced.

It is not clear on the cases whether a court would now be persuaded that personal service had been made in circumstances illustrated by the decision in *Rhodes* v. *Innes*.[183] There, a writ, enveloped in a letter, was left at the defendant's home with the defendant's son. The son, who said that his father was in the house and would receive the document, was told what the envelope contained. Chief Justice Tindal said:[184]

> There is no magic in the word *personal*, and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient. Has there not been virtually a personal service here? The clerk endeavours to see the Defendant, but an interview is eluded by a trick between the father and son. That strictly personal service is not always required appears from the case of *Smith* v. *Wintle* (Barnes 292), where the plaintiff put a copy of the writ through the crevice of the door, and seeing the defendant within, near the crevice, told him what the paper was. The Court held the service sufficient, and the defendant was not allowed to shut the plaintiff out by a trick on the technical meaning of the word *personal*. So here the son was served, and promised to convey the writ to his father, and when the father seeks to set aside the service, he ought to shew what the son did with the writ. But he merely swears, vaguely, that he was not *served*, not that he never saw the writ . . .

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[177] (1854) 4 DeG. M. & G. 328, 43 E.R. 534

[178] *Ibid.* at 539. *See also Tweed* v. *Thall*, [1943] 2 W.W.R 246 (Sask. K.B.).

[179] W.G. Clay, *The Law and Practice Relating to Writs of Summons, Their Issue and Service* (1894) at 111.

[180] In *Archbold's Practice of the Court of Queen's Bench* (9th ed., 1855), it is put this way at 173-4: "It is not necessary to leave the copy in his actual corporal possession; for, whether the party touches him, or puts it into his hand, it is immaterial. Personal service may be where you see a person, and bring the process to his notice. [This "commentary" is *verbatim* from *Thomson* v. *Pheney*, (1832) 1 D.P.C. 441 at 443, per Patteson, J.] . . . But the question, whether personal service has been effected in any particular instance, must depend upon its peculiar facts."

[181] (1966) 57 W.W.R. 641 (B.C.S.C.).

[182] *Ibid.* at 646.

[183] (1831) 7 Bing. 329; 131 E.R. 127.

[184] *Ibid.* at 127.

Park and Bosanquet, JJ. agreed. The remark of Alderson, J.[185] puts the case into its true light: "The Defendant must have known the contents of the paper, and has only not actually received the writ, because he did not choose to receive it."[186]

The *Rhodes* decision preceded *Goggs* v. *Lord Huntingtower*,[187] in which a stricter view of personal service was taken,[188] but *Rhodes* is now, at least arguably, consistent with *Orazio* v. *Ciulla*.[189] Nonetheless, the safer course for a deputy sheriff to adopt is to approach only the person to be served and to leave the document with him. At the least, he may throw the paper down before that person after informing him of the nature of the process. Such a practice would seem to satisfy the *Orazio* test.[190]

8. Other Modes of Service

Rule 11 (2) prescribes the way in which corporations, unincorporated associations, infants and mentally incompetent persons may be served. Many provincial statutes also provide modes of service for example, service on co-operative associations or trust companies. At least until the sheriff is required to accept documents for service (and perhaps afterwards as well), it should be for the party who engages the sheriff to specify the mode by which service should be made. It should be said that very rarely in practice is the sheriff asked to make service otherwise than personally.

9. Original Documents

No matter who is served or how, it is not necessary for the process server to show the original document. A copy is sufficient, as is now clear from Rule 11 (2) of the *Rules of Court*.

10. Service Under the Small Claim Act

The origin of the preference accorded the sheriff in serving process under the *Small Claim Act*[191] has already been described, and an opinion about the validity of service by others has already been expressed.

11. Who Serves the Sheriff?

A lawyer in a small town in the Province asked how he could serve a deputy sheriff in his community who had been his client but who had left part of the lawyer's bill unpaid. There are (perhaps not surprisingly) no local authorities on this point. But in the Republic of South Africa, when the same problem presented itself, the deputy served himself, and the service — though held to be an irregularity — was not vitiated by the court: *Dreyer* v. *Naidoo*.[192] It is worth reading Holmes, J. at length:[193]

> This is a whimsical case about a deputy sheriff who served a summons upon himself as defendant. As far as counsel are aware, this is the first time that it has happened in South Africa. The matter now comes before the Court as an application by the defendant under Order XI Rule 54 for an order setting the service aside as irregular. The plaintiff issued summons against the deputy sheriff at Estcourt

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[185] *Ibid*. at 128.

[186] *See also The General Tire and Rubber Company of Canada, Limited* v. *New Westminster Vulcanized Whitehall Ltd.*, (B.C.S.C. Vancouver Registry No. C766203, 1 June 1977).

[187] (1844) 12 M. & W. 503, 152 E.R. 1297.

[188] Parke, B. said, at 1297, that " . . . in future, there shall be no equivalent for personal service."

[189] *Supra*, note 181.

[190] It should not be forgotten that an order of the court need not be personally served where the " . . . existence of the order has been brought to the knowledge of a person who is evading personal service . . . " *See* the reasons of Mathew, L.J. in *Kistler* v. *Tettmar*, [1905] 1 K.B. 39 at 45. Stirling, L.J. concurred.

[191] R.S.B.C. 1979, c. 387.

[192] 1958 (2) S.A. 628 (N.P.D.).

[193] *Ibid*. at 628-9.

> claiming £2,000 as damages for wrongful attachment. When the plaintiff's attorneys forwarded the summons to the deputy sheriff for service, he raised the question whether it would be regular for him to serve it on himself, and their reply was that this course would not be irregular, and indeed that if the summons were not served without further delay, the plaintiff would regard this as an irregularity! Thereupon the deputy sheriff served the summons on himself. He does not say how he accomplished this dextrous feat, save to aver modestly that he "went through the motions"—thereby no doubt letting his left hand know what his right hand was doing. For this nimble service he charged the plaintiff a fee of 10s 7d., which included cost of living allowance—an ambidextrous sheriff must live. The return of service indicates that he explained to himself the "nature and exigency of the summons". Doubtless this involved a little auto-suggestion. Thereafter he was prudent enough to enter appearance to defend. But the arrival of the declaration apparently caused him to have some misgivings, and he now applies, as defendant, for the service to be set aside as irregular. His right hand however has not lost its cunning, for he seeks to turn the irregularity to his advantage with a tactical prayer that the plaintiff be ordered to pay the costs of this application before reserving the summons, upon the ground that the plaintiff is a man of straw—a prayer which, if granted, might have the effect of preventing him from bringing his case before the Court.
>
> Well now, what is the Court to do about this drollery?

In the end, the judge suggested that the sheriff appoint an acting deputy for the purpose of service, as a relevant statute permitted. That solution seems to be the most sensible one in those rare situations in which no one else can be found to do what has to be done. In this Province, under section 2 (2) of the *Sheriff Act*,[194] the director of sheriff services could appoint a person to act temporarily as a sheriff for the limited purpose of effecting the single service.[195]

12. SERVING THE WRONG PERSON

Historically, when a sheriff was commanded to execute process by making an arrest, it seems that he was not liable in trespass at the suit of a person arrested by mistake for the initial taking, but that he could be liable for a false imprisonment if he continued to hold the person knowing that that person was not the person who should have been arrested:[196] By analogy, in the absence of helpful authorities, it is probably safe to say that a deputy sheriff who, through honest mistake, serves a person other than the person who should have been served will not be held liable (for example) for any touching that may have been involved. But if the deputy is insistent, despite denials made by the person he is trying to serve, and in the face of proofs from others that he has the wrong person, any touching may not be excusable. The wise deputy (as is the practice) will confirm identity before advancing.

On a related point, deputy sheriffs should still take all necessary steps to effect personal service where the person to be served complains that he is not the party named in the process because his name is incorrectly spelled in the paper to be served. In 1980, in this Province, a man to whom a jury notice was given by a sheriff found himself jailed for two hours and then fined $400.00 for contempt when he ignored the notice in which his name was misspelled and which had been served on him and failed to appear in court for jury duty as required.[197]

13. PRIVILEGE AND IMMUNITY FROM SERVICE

It is probably best here, because of the absence of authorities, to state questions rather than to try to answer them. Some people, notably ambassadors and their staffs, are immune from process.[198] Does that mean that a sheriff who serves one of the members of the class and, in serving, touches, is liable for damages for trespass to that person? And, if so, is it the sheriff's duty to enquire of *every* person whom he is instructed to serve whether that person enjoys a diplomatic privilege?

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[194] R.S.B.C. 1979, c. 386.

[195] This is not a problem which has escaped the notice of Australian sheriffs: *see Transcript of Minutes of Conference of Sheriffs* Melbourne, [illegible]7 February 1979, at 13-4.

[196] *Dunston* v. *Paterson*, (1857) 20 C.B.N.S. 495.

[197] *See The Vancouver Sun*, November 19, 1980 and *see also* D. Camp, "The Decline in Public Morality" *Saturday Night* (January 1981) 26, at 29.

14. INTERFERENCE WITH PROCESS SERVERS

Deputy sheriffs and others who serve the courts' process should know that the court will protect them in the exercise of their duties as process servers. *Price* v. *Hutchison*[199] stands as an eloquent statement of the protections (albeit *ex post facto*) which will be extended. In that case, Mr. Vanderpump was sent to serve a document on Hutchison. Hutchison refused the papers and then locked the door, and with the help of an associate refused to allow Mr. Vanderpump to leave unless he took the papers with him. When Mr. Vanderpump tried to exit, he was forcibly detained and threats were made that he would be thrown from a window and beaten. The police finally arrived in response to the cries of the process server, but the next day the defendant threatened to sue Mr. Vanderpump for damages for trespass if he did not apologize for his conduct. A motion was made that Hutchison and his associate be committed for using violent and abusive language to a person serving the process of the court. Malins, V.C. began his reasons for judgment by saying:[200] "This is one of the most extraordinary cases that has ever been brought before the Court." He continued:

> It is not a slight thing that the process of this Court should be treated with contempt, or that a person who is engaged in serving the process of this Court should be molested in the discharge of that duty, or that anything should take place which could throw any doubt whatever as to his personal safety in the conduct of the business of the Court.

In the result, and in order to ensure that Hutchison " . . . shall feel that this Court and those who are engaged in the discharge of duties attached to it are not thus to be treated,"[201] Hutchison was committed, along with his associate. The report indicates that Hutchison was 16 days in jail and was freed on the immediate payment of £40 (not an insubstantial sum then) toward the expenses of the proceeding, with costs to be taxed, and on his undertaking to pay the difference between the deposit and the taxed costs.

15. DELAY

As indicated above, the complaint most commonly made about service of process by the sheriff is that too much time elapses between the day on which a document to be served is placed in his hands and the day on which a report is made of what has happened. Most lawyers in Vancouver prefer to use private process servers because private process servers can be controlled effectively. They know that they may not be called on again if they do not meet the standard of performance which is expected of them by the instructing solicitor. For sheriff services, it is a problem of manpower and therefore a problem of money. The government (it seems patent) does not have the means to pay the number of deputies that would be required in Vancouver to ensure that adequate service was provided to all who chose to take their work to the sheriff. In the government's defence, however, there has been some improvement in recent years, apparently owing to the employment of the independent contractors — the "fee for service" process servers. Still, there is not the demand there might be had the office not acquired the reputation that it cannot be relied on for prompt and persistent action. Certainly the state of things in this Province cannot be compared with that in New South Wales where in 1979 the sheriff reported[202] that private process servers were sending documents to the office of the sheriff for service.

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[198] *See*, *e.g.*, *R.* v. *A.B.*, [1941] 1 K.B. 454.

[199] (1870) L.R. 9 Eq. 534.

[200] *Ibid.* at 536.

[201] *Ibid.*

B. Escort Duties

In what is now called *De Profundis*, the long letter Oscar Wilde wrote to Lord Alfred Douglas while suffering his imprisonment at Reading Gaol, Wilde described a scene in which he had figured about six months after his incarceration began:[203]

> Everything about my tragedy has been hideous, mean, repellent, lacking in style. Our very dress makes us grotesques. We are the zanies of sorrow. We are clowns whose hearts are broken. We are specially designed to appeal to the sense of humour. On November 13th 1895 I was brought down here from London. From two o'clock till half-past two on that day I had to stand on the centre platform of Clapham Junction in convict dress and handcuffed, for the world to look at. I had been taken out of the Hospital Ward without a moment's notice being given to me. Of all possible objects I was the most grotesque. Each train as it came up swelled the audience. Nothing could exceed their amusement. That was of course before they knew who I was. As soon as they had been informed, they laughed still more. For half an hour I stood there in the grey November rain surrounded by a jeering mob. For a year after that was done to me I wept every day at the same hour and for the same space of time.[204]

It is to the credit of sheriff services that its Operating Manual[205] contains a clear and direct reminder that deputy sheriffs, "[a]s representatives of the Court, . . . have a special obligation to allow persons in their custody their civil rights and dignity."

Escorting prisoners from lock-ups and from jail to Court and back is undoubtedly employment of the most depressing kind. It is certainly dangerous.[206] Yet every day throughout the Province, scores of prisoners[207] are moved by deputies in sheriff services, usually without incident, and, for the most part, invisibly. There are from time to time escape attempts and very occasionally successful escapes are reported in the press.[208] On the whole, however, there is no reason to think that this thankless work is being badly done, though talk of disgruntled deputies, who may be less attentive to their duties than they ought to be, is not unheard of.

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[202] *Supra*, note 195 at 106.

[203] *See* R. Hart-Davis, ed., *Selected Letters of Oscar Wilde* (1979) at 219.

[204] Others escorting Wilde were more compassionate. In the same letter, *ibid.* at 224, Wilde describes " . . . the common policemen who in their homely rough way strove to comfort me on my journeys to and fro from the Bankruptcy Court under conditions of terrible mental distress . . . " By s. 131 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, the court may order that imprisoned bankrupts be produced into the protective custody of a sheriff in order to enable the bankrupt to attend in court in bankruptcy proceedings.

[205] (1979) at chapter 6, page 1.

[206] In one case, deputy sheriffs refused to transport certain prisoners charged with the murder of a fellow inmate from a jail to the courthouse (which lay about 60 miles distant). They felt the risk to be too high in light of the notoriety of the prisoners for violent behaviour. In the end, the Royal Canadian Mounted Police performed the escort work. It is arguable whether the deputies could have avoided disciplinary action if any such steps had been taken (and apparently they were not) by reason of clause 22.03 of the Master Agreement, which prohibits disciplinary action "for refusal to work on a job" which safety inspectors deem, after an "on-site inspection," not to meet the standards established pursuant to the *Workers' Compensation Act*." On this point, it is interesting to ask, if the sheriff still has the power to raise the *posse comitatus* (*see* Chapter VII), whether he can do so when escorting or guarding prisoners. Morris, *supra*, note 11 at 227 gives an example of the use of a *posse* for this purpose between 1231 and 1234. If the *posse* can be raised, then the sheriff should not refuse to act, but should instead command the police or others (including members of the military) to assist him. The military has been used in England to assist the sheriff on executions: *see* R.M. Jackson, *Enforcing the Law* (1967) at 4:

> If sheriff's officers are prevented by force or threatened violence from seizing goods or entering upon property they must call on the police; if the police cannot tackle the job the armed forces must be brought in. This is no fantasy, for a small naval force has actually been sent to a small island where the inhabitants threw rocks at the sheriff's officers when they tried to land from a boat.

In England "in practice" the *posse* means police assistance: *see* D.F. Martin, "A Comparative Study of Enforcement in England and France" (1982) 1 C.J.Q. 219 at 220.

Escort deputies into whose hands a prisoner's personal effects have been placed are responsible for their safekeeping. This responsibility has existed since about 1200 at least.[209] There seems to be no reason to think that escorting deputy sheriffs should not be liable as police officers are for criminal or tortious assaults or batteries.[210] If a prisoner dies while detained by or in the custody of a deputy, the death must be reported immediately to the coroner.[211] Whether deputy sheriffs will be held liable for acts caused by those who escape from their custody will likely be determined by the principle stated by the House of Lords in *Home Office* v. *Dorset Yacht Co. Ltd.*[212]

As a rule, prisoners are handcuffed while they are transported, although exceptions are made for those handicapped and infirm persons who are thought to be incapable of escape. Shackles may be used if the supervising deputy thinks that they are necessary.

Arms may be carried only if permission is granted by a supervisor who is authorized to issue them.[213] Deputies may search prisoners without warrant for firearms by section 5 of the provincial *Firearm Act*[214] and, by section 96 of the *Criminal Code*,[215] will not be criminally liable for possession of a prohibited or restricted weapon acquired as a result of the search.

Deputies should not accept a prisoner unless a warrant or order authorizing detention is produced,[216] although, as the Operating Manual[217] suggests, it may be that a deputy will be excused from liability for unlawful imprisonment if he has reasonable and probable grounds to believe that a warrant is in force for the person detained in the territorial jurisdiction in which the person is transferred to the deputy.[218]

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[207] In addition to prisoners required in court to face outstanding criminal charges, sheriff services escorts persons in custody who are required as witnesses for the Crown or for the defence. Fees are charged for escorting defence witnesses: *see* Court Services Circular, CSS 2/81, February 1981. As well, escorts are performed for "outside agencies," notably the Ministry of Health, for whom persons admitted as mental patients under the *Mental Health Act*, R.S.B.C., 1979, c. 256, ss. 20 and 21, are moved. According to a memorandum dated 12 July 1979 over the signature of the consultant for sheriff services, some complaints about escorts of mental patients had been made, notably that they were handcuffed (not restrained by belts), that they were placed in cells at "drop-off" points, and not taken directly to the hospital or institution which was their destination and that they were being moved in prisoner vans, not in aircraft or screened cars. The author of the memorandum took pains to distinguish mental patients from what he called "psychiatric remandees:" persons remanded for psychiatric investigation pending trial on criminal charges. Those people were prisoners and were to be treated as such. For an interesting account of sheriff services at work escorting, with particular reference to the detail at the Vancouver International Airport, *see* (1982) 3 Forum (Issue 3) at 1. Sometimes private aircraft are hired when extremely dangerous prisoners must be transported: *see* "Sheriff's Office Has Received More Authority," *The [Kamloops] Daily Sentinel*, 29 December 1977 at 3. By reason of s. 45 of the *Court Order Enforcement Act*, R.S.B.C. 1979, which prohibits the taking of debtors in execution, the sheriff no longer "escorts" people who have not satisfied judgment debts, unless they have been committed to jail for contempt of court: *see Microwave Cablevision Ltd.* v. *Harvard House Capital Ltd.*, (1982) 37 B.C.L.R. 101 (B.C.C.A.).

[208] *E.g.*, "Prisoner Escapes from Sheriff's Van," *The Vancouver Sun*, 6 May 1981 at 3. The reported escape was described by a member of sheriff services' central escort section as ". . . the first of its kind during the sheriff's service seven-year history."

[209] Morris, *supra*, note 11 at 147. *See also* Court Services Circular CSS 5/80, 26 June 1980, which spells out the steps that should be taken by escorting deputies to protect effects. *See also* Ministry of Attorney General, *Sheriff Services Operating Manual* (1979) chapter 6, page 4.

[210] By s. 25 of the *Criminal Code*, R.S.C. 1970, c. C-34, deputies will be excused if they act on reasonable and probable grounds and only use as much force as is necessary. In a Province as large as British Columbia, it must be assumed that from time to time deputy sheriffs, will have to come to the aid of prisoners under their charge who become ill or are injured, *e.g.*, in a motor or airplane accident. A deputy acting in such circumstances will not be liable for any injury or aggravated injury or death which he causes unless it is established that his actions or omissions were grossly negligent: *see Good Samaritan Act*, R.S.B.C. 1979, c. 155. Deputies have been instructed not to give medication: *see* the *Operating Manual*, *supra*, note 209 at chapter 6, page 6.

[211] *Coroners Act*, R.S.B.C. 1979, c. 68, s. 9 (3).

[212] [1970] 2 W.L.R. 1140.

[213] *See* Court Services Circular CSS 8/79, 16 November 1979 and *Sheriff Services Operating Manual* at 2-60.

[214] R.S.B.C. 1979, c. 134.

[215] R.S.C. 1970, c. C-34.

[216] *See*, *e.g.*, warrants under ss. 457.1, 461, 500, 636, 661, 707, 741, 745 and 759, and orders under s. 465 of the *Criminal Code*, R.S.C. 1970, c. C-34.

[217] *Supra*, note 209 at chapter 6, page 4.

[218] *Criminal Code*, R.S.C. 1970, c. C-34, s. 450.

There is at least one problem about escorts to which no one seems to have turned his mind. This is the problem of determining, as between the executive and the judiciary, who has what powers with respect to prisoners. What, for example, ought to be done, and by whom, when a prisoner who is scheduled for trial is not produced from jail at the appointed time, either by design or by reason of neglect. In a case reported recently in the press,[219] a Judge of the Provincial Court of British Columbia invited counsel for an accused person to apply for an order when the prisoner was not delivered up to the court within 45 minutes of the scheduled time for trial. When an application was made to the court for a remedy under section 24 of the *Canadian Charter of Rights and Freedoms*, an order was granted staying the charge.

As early as the 13th century[220] and into more modern times,[221] the sheriff himself was jailer. Now he is not[222] and it is not clear what the powers of the judges might be. It may be a question of deciding in whose control the person of the prisoner is. Most judges would probably be reluctant to order the production of an accused person, citing the lack of any authority for an order of that kind, and justifying their reluctance with the answer that the accused is the Crown's prisoner and that he would undoubtedly be released on *habeas corpus* if held beyond the scheduled trial date.[223] Attention ought to be paid to this problem so that executive and judiciary come to understand the limits of their respective powers, so that consistency in practice is achieved and so that life does not come to imitate hypothesis. If, as is now the practice, the courts are entitled to direct the order in which cases are to be tried,[224] then it seems to follow that they should have the means to control the flow of prisoners, without putting the onus on the prisoner to apply for release in order to stand his trial. Perhaps thought should be given to making the sheriff jailer once again.[225]

C. Jury Administration

1. THE DUTY

In British Columbia, the sheriff[226] summons jurors in criminal cases pursuant to section 9 of the *Jury Act*,[227] which provides in part:

> (1) Where the Lieutenant Governor in Council has, by order, fixed times and places for sittings for the hearing of criminal trials with a jury, the sheriff, on receipt of a certified copy of the order shall, not less than 15 days before the

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[219] "Judge Stays Charge After Man Left in Cell" *The Vancouver Sun*, 16 November 1982, p. A3.

[220] *See, e.g.*, Morris, *supra*, note 11 at 186-7, where it is reported that: "In 1275 the *corpus* of Colchester castle was committed to the sheriff, so he might keep prisoners in the jail there . . ." and that: "By Bracton's time the castle was proverbially the meeting-place of the county court. Of course it might still be a fortress, but when in custody of the sheriff, it was a prison and a public building for county use rather than a stronghold . . ."

[221] *See, e.g.*, J. Impey, *The Office of Sheriff*, (1786) at 76-7: "Goalers [sic] are also servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant; and if they suffer any such to escape, the sheriff shall answer it to the king if it be a criminal matter; or in a civil case, to the party injured."

[222] It is almost certain that the sheriff will not be held liable for escapes from jails he no longer controls. In a report attached to *Mitton's Case*, (1584) 4 Co. Rep. 32b, 76 E.R. 965 at 969-70, it is said: "Mich. 39 & 40 Eliz. [1597-8] at Serjeant's inn in Fleetstreet it was resolved by Popham and Anderson Chief Justices, and all the Justices of England, . . . the custody of [the gaols of counties] belongs to the office of sheriff, who being immediate officer to the King's [?] Courts, shall answer for the escapes, and shall be subject to amerciaments if he has not the body in Court upon process directed to him . . . and therefore it would be against all reason, that he should answer for escapes out of the said gaols, and that he should be subject to amerciaments for not having the bodies of prisoners, &c., and yet another should have the keeping and custody of the gaol."

[223] On this point, *see Anon.* (1654) Styles 418, where "The Court was moved for one brought out of Wales by a Habeas Corpus, that he may be bayled, because they have no Gaol-delivery there." It seems that the prisoner was "bayled" and that he was made to answer the charge at the next Assize.

[224] *See* J. Deschenes, *Independent Judicial Administration of the Courts* (1982) at 130.

[225] This might not be necessary if the jailer himself is an officer of the court: *see, e.g.*, J.C. Fox, *The History of Contempt of Court* (1927) at 156. For an account of a case in which the sheriff was left to choose which of two judges' orders he should obey, *see* "Police State Justice Cited in Drug Case," *The Sun* (Vancouver), 17 August 1983 at A1, "Lawyer Blames Judge for Court Row," *The Sun* (Vancouver), 22 August 1983 at A2 and "Rights of Accused not Abused in Bail Hearing," *The Sun* (Vancouver), 23 August 1983 at A11.

> commencement of the sitting referred to in the order, empanel[228] a sufficient number of jurors for the cases that may be heard during the sitting.

The duty of the sheriff to summon jurors in civil cases is set forth in sections 14 and 16 of the same statute. Section 16 provides:

> (1) The party requiring a jury shall leave, at the office of the sheriff, not less than 30 days' notice of the day, time and place fixed for the trial and the sheriff shall empanel a sufficient number of jurors as are needed to be summoned to attend the court at a day, time and place fixed for the trial and the court shall administer, to those of them empanelled to try any cause, an oath to give a true verdict according to the evidence.
>
> (2) The sheriff, at least 15 days before the day on which the juror is required to attend, shall summon the juror by delivering to him, or, in case of his absence from his usual residence or place of business, by leaving for him with some person there residing or employed who appears to be at least of the age of 16 years, or, in any case, by mailing to the last known address of the juror, a notice in writing signed by the sheriff containing the particulars of the time and date of the trial at which the juror is required to attend.

2. CONTROL OF THE SUMMONER

The sheriff's responsibility to summon is an ancient one and for that reason it is no surprise that he was the official chosen for the task in British Columbia.[229] So long as his impartiality can be ensured, there is no reason to suggest that he ought to be replaced with some other official. Indeed, if the Legislature takes up the recommendation contained in Chapter IX to repose in the courts all responsibility for the administration of the office of sheriff, then impartiality will be secured and the sheriff's continued usefulness as a summoner will be ensured.[230]

The books[231] are replete with accounts of the injustices to which interested sheriffs who summoned jurors in England contributed, particularly in the seventeenth century. One writer,[232] who recounts the case of Stephen College — tried before a Whig jury returned by Whig sheriffs — concludes from an examination of the case that:[233]

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[226] No longer does the sheriff summon jurors for either civil or criminal cases in England. By section 31 of the *Courts Act, 1971*, 18 & 19 Eliz. II, c. 23, it was laid down by Parliament that in future ". . . the Lord Chancellor shall be responsible for summoning of jurors to attend for service in the Crown Court, the High Court and county courts and for determining the occasions on which they are to attend when summoned, and the number to be summoned." According to an official of the Lord Chancellor's Department, in a letter dated January 30, 1981, the Act ". . . enacted the main recommendations of the Report of the Royal Commission on Assizes and Quarter Sessions. The new court structure . . . became responsible for administering all the work of the higher courts . . . ." [The Commission] recommended that ". . . the responsibility for summoning jurors should in future rest with the appropriate officer of the new court service. This clearly meant a radical break with the long-standing custom whereby sheriffs summoned jurors for Assizes and county Quarter Sessions." The Under-sheriff of London reported in 1980 that he had contracted with the Lord Chancellor to be responsible in Greater London for summoning jurors in criminal cases. He does not summon them *qua* sheriff.

[227] R.S.B.C. 1979, c. 210.

[228] A hint of the origin of the word "empanel" is found in 3 Bl. Comm. at 353 where it is said that the sheriff ". . . returns the names of the jurors in a *panel* (a little pane or oblong piece of parchment) annexed to the writ." The writ, in civil cases (said Blackstone, at 351), was the writ of *venire facias*, awarded by the court, and which commanded the sheriff ". . . that he cause to come *here* on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be better known . . . ." *See also* Wm. Forsyth, *Trial by Jury* (1878, 1971) at 139 and W.H. Watson, *A Practical Treatise on the Office of Sheriff* (1848) at 385. According to G. Atkinson, *Sheriff-Law* (3rd ed., 1854) at 92, the writ of *venire facias* was abolished in 1852 by the *Common Law Procedure Act*, 15 & 16 Vict., c. 73, s. 104 and was replaced by a precept issued by the judges of assize. Notably, as late as 1852, it was still the judiciary, and not the executive, who directed the sheriff to summon jurors.

[229] By 1885, however, the sheriff in England (actually the under-sheriff) seems to have had the work only by default: *see* F.W. Maitland, *Justice and Police* (1885) at 106.

[230] In the *Order in Council Establishing a Supreme Court of Civil Justice in Vancouver's Island, and Regulating Appeals Therefrom to Her Majesty in Council*, (4 April 1856) provision was made for empanelment of juries according to the Judge's rules, thereby assuring that there would be no executive interference and no appearance of such interference.

[231] Including the statute books. Chapter 1 of 3 Hen. VII (1486) contains a reference to "untrue demeanings of sheriffs in making of panels."

[232] A.F. Havighurst, "The Judiciary and Politics in the Reign of Charles II, Part II 1676-1685 (1950) 66 L.Q. Rev. 229. *See also* Forsyth, *supra*, note 228 at 347, where the sheriffs are described as "tools of the government" and P. Devlin, *Trial by Jury* (1956) at 26. There it is said that: "In the old days anyone who wanted to pack a jury (and frequently it was the Crown who did) began by getting the sheriff to see that only the well-disposed got on the panel."

[233] Havighurst, *ibid.* at 242.

> These sheriffs were thus using their office to strengthen Whig opposition. Indeed the important constitutional issues of 1681-2 were the relation of sheriffs to juries and the relation of juries to common law judges.

The likelihood is remote today of a politically-minded sheriff summoning a jury which he believes will give a verdict according to his preference, but it must not be forgotten that today the sheriff is appointed by a Commission over which the government exercises control, that he discharges his responsibilities under the direct supervision of the Deputy Attorney General, that he is paid with a cheque issued by the Province and that he is required to return juries in criminal cases, in a large number of which the provincial Crown[234] is a party. Those members of the public who question whether justice is always seen to be done when juries in this Province are returned, are not, it is suggested, concerning themselves with a triviality. Their question and their concern goes to the heart of the recognized requirement of impartiality in the administration of justice by the courts.[235]

3. THE ORDINARY JURY

By section 2 of the *Jury Act*,[236] every person, unless disqualified by the Act, "has the right and duty to serve as a juror." By section 7: "The sheriff, having regard for the principle in section 2, may determine the procedures he considers appropriate for the selection[237] of jurors." The discretion so given is absolute. In practice, in this Province, the deputy sheriff has recourse to municipal and provincial voters lists and to telephone and city directories, from which the necessary panels are made up.

In theory, the sheriff ought to return a panel that is "representative of the community."[238] Thus, as the Law Reform Commission of Canada said in a working paper in 1980:[239] "It is now generally accepted that any method of selecting jurors other than randomly is unacceptable."

4. PANELS IN BRITISH COLUMBIA[240]

In July, 1980, the Chairman of the Criminal Justice Section of the British Columbia Branch of the Canadian Bar Association wrote to say what his group thought of jury panels in criminal cases in the Province. His letter is illuminating:

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[234] In its *Report on The Crown as Creditor: Priorities and Privileges* (LRC 57, 1982) the Law Reform Commission of British Columbia, at 3, concluded that "Crown" now means government.

[235] The same concern was expressed in England in the *Report of the Departmental [Morris] Committee on Jury Service* (1965) Cmnd. 2627 at 82, where it was said: "we were not convinced by the argument of the Under Sheriffs Association that it is in some way inappropriate for clerks of courts to have any responsibility for summoning jurors. We find this contention very difficult to follow. Indeed insofar as it depends on the need to preserve the appearance, as well as the substance, of impartiality, we think that it applies much more forcefully to under-sheriffs, who are officers of the Crown, in whose name prosecutions are brought." *See* A.T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection* (1956) at 67-8 for the American experience and compare with Forsyth, *supra*, note 228 at 361.

[236] R.S.B.C. 1979, c. 210.

[237] "Selection" is probably the wrong word in this context. When the sheriff makes up the panel he is not "selecting" jurors. Jurors are "selected" by lot from the panel before trial.

[238] *See, e.g.*, Law Reform Commission of Saskatchewan, *Proposals for Reform of the Jury Act* (1979) at 7 and T.F.T. Plucknett, *A Concise History of the Common Law* (4th ed., 1948) at 123 where it is said that: ". . . . in its origin the jury is of a representative character." *See also* The Morris Report, *supra*, note 235 at 18: "A jury should represent a cross-section drawn at random from the community." *And see* J. Baldwin and M. McConville, "The Representativeness of Juries" (1979) 129 New L.J. 284, Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980) at 37 and A. Dickey, "The Jury and Trial by One's Peers" (1973-74) 11 U. West. Aust'l. L. Rev. 205. In recent years, complaints have been made because juries did not contain, in the opinion of the accused, any or a sufficient number of women, native Indians, blacks or persons speaking the same language as the accused person: *See, e.g.*, *R.* v. *Broderick*, [1970] Crim. L.R. 155 (C.A.); *Regina* v. *Henni*, (1971) 18 D.L.R. (3d) 320 (Que. S.C.); *Rose* v. *The Queen*, (1972) 19 C.R.N.S. 66 (Que. S.C.); *Regina* v. *Bradley and Martin (No. 1)*, (1973) 23 C.R.N.S. 33 (Ont. S.C.); *Regina* v. *La Forte*, (1976) 62 D.L.R. (3d) 85 (Man. C.A.) and *Regina* v. *Diabo*, (1976) 27 C.C.C. (2d) 411 (Que. C.A.). For discussions of race and jury composition, *see* "The Case for Black Juries" (1970) 79 Yale L.J. 551 and A. Dashwood, "Juries in a Multi-Racial Society" [1972] Crim. L.R. 85.

[239] Law Reform Commission of Canada, Working Paper Number 27 at 47.

[240] A theory of the origin of a list of prospective jurors is advanced in C.H. Karraker, *The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and The Chesapeake Colonies, 1607-1689* at 17-8.

> It was suggested that jury panels are composed of a disproportionate number of suburban housewives as opposed to west end high rise residents because the Sheriffs work a 9–5 routine and therefore find it very difficult to serve those who are at work during those hours.
>
> It was alleged that it was infinitely easier to quickly obtain a panel from a residential street in Kerrisdale or North Vancouver, rather than from a tower at Burnaby and Bute Street [in the fashionable west end] or from a hotel in the downtown east side [a notoriously run-down area of Vancouver].[241]

An Interior lawyer wrote to say that in his experience as well panels tended to consist of "upper middle or upper class people, who have never been on welfare or unemployment insurance."

July 1980 also produced guidelines from "Court Services" for empanelment. It is worth reproducing these guidelines and the commentary which preceded them in full:

> Concerns have recently been expressed by some Judges of the Supreme Court concerning the selection of jury panels. It appears that in some places some Sheriffs may be unnecessarily restrictive in geographical areas from which the names are selected and in the sources for the selection of those names. While it is clear from the Jury Act that it is the right of the Sheriff to select the jury panel and there is no longer any requirement that he use any specific means for selecting that panel, it should be borne in mind that an accused person is entitled to be tried by a jury of his peers.[242] In order, therefore, that not only must justice be done, but be seen to be done, the following guidelines should be borne in mind when selecting a jury panel:
>
> 1. Impanel the jurors from as wide a geographical area as possible within the County, and is reasonable in the circumstances.
> 2. Use as many sources as are available for the selection of names, such as the voters list, the telephone book, city directory, etc.
> 3. Endeavour to make sure that a variety of names are selected from "A" to "Z".
> 4. Endeavour to select some of the jurors from the area where the accused resides, where possible.
> 5. Do not attempt to exclude persons from ethnic or minority groups, e.g., Native Indians, Chinese, East Indians, etc.
> 6. Endeavour to make sure there is no sexual discrimination.
> 7. Endeavour to make sure there is a variety of occupations.

It must be evident from the letters and from the guidelines that in British Columbia there is no "uniform or mechanical"[243] system of choosing members for jury panels. Indeed, reference to lists obtained from sheriff services in Vancouver and an Interior city in 1980 (both before and after the guidelines were issued) confirm that that is the case. The Interior list contains names distributed throughout the alphabet, while the Vancouver lists are restricted to names beginning with the letters "F" to "L" and "G" to "M".[244] Both Vancouver lists, showing groups of prospective jurors drawn from the same close neighbourhoods,[245] were clearly made up to expedite service of jury notices.[246] The list of 20 Interior names includes no one who could be described as a "worker." This fact may or may not be related to an admission made by a deputy sheriff in that community that an effort was usually made to list people who were known to be responsible.

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[241] The Chairman qualified the comments of his group by saying: "The material that forms the basis of our discussion was not the result of a scientific survey but rather it was derived from the collective experience of the criminal section before the courts. I suspect, however, that this joint perception is an accurate one."

[242] Dickey, *supra*, note 238 at 208-09, puts the lie to the notion that *Magna Carta* ever guaranteed a trial by a jury comprised of one's "peers." Thus, it would be wise to remind the deputies, not that "an accused person is entitled to be tried by a jury of his peers," but that he is "entitled to be tried by a jury comprised of persons representative of the community, randomly selected."

[243] W.R. Cornish, *The Jury* (1968) at 42.

[244] In S. Forgie, *Challenge to the Array* (1975) 49 Aust'l. L.J. 528 at 536, mention is made of a challenge to the array in Queensland in 1973 on the ground that "only persons with a surname beginning with a letter of the alphabet from "A" to "G" were chosen. In the end, the challenge was not pressed, so that no decision by the Court was made. Challenges to the array are discussed later in this part.

[245] Drawing prospective jurors from the same neighbourhood may be undesirable for the reasons given in the *Morris Report*, *supra*, note 235 at 73: "We think it is inherent in the concept of a jury as a cross-section of the community that its members should as far as possible be unknown to each other before they meet in the jury box, and should come from different areas and social strata. Otherwise there is a danger that personal and social relationships between jurors will affect their deliberations . . . ."

It would seem sensible these days to make full use of computers in drawing jury panels, both to eliminate uneconomical manual listing and as a means of promoting random empanelment.[247] In 1979, the Law Reform Commission of Saskatchewan recommended that use (with appropriate confidentiality safeguards) be made in that Province of the computerized lists of beneficiaries within *The Saskatchewan Hospitalization Act*. That list is maintained by the Saskatchewan Hospital Plan and was said to contain the names of 98 per cent of the population of Saskatchewan.[248] Presumably, a computer used for the purpose of random empanelment could be programmed in such a way that panels for the various registries of the courts in the Province could be drawn to ensure that jurors are not unnecessarily inconvenienced by long journeys to exercise their right and discharge their duty.

Before leaving the subject of panels, it should be pointed out that in criminal cases only an accused person who is to be tried by a jury on a charge of treason or of being an accessory after the fact to high treason is entitled to a copy of the panel of jurors.[249] No provision is made elsewhere by statute for provision of the panel to an accused person or to a litigant in a civil case. In practice, however, copies of the panel are made available a few days before trial, although they are not made available to the public at large.[250]

5. PERSONS DISQUALIFIED FROM SERVICE AS JURORS

In British Columbia,[251] a person is disqualified from serving as a juror who is:

(a) not a Canadian citizen;
(b) not a resident in the Province;
(c) under the age of majority;
(d) a member or officer of the Parliament of Canada or of the Privy Council of Canada;
(e) a member or officer of the Legislature or of the Executive Council;
(f) a judge, justice or court referee;

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[246] Cornish, *supra*, note 243 at 42-3, described findings of the Morris Committee which suggest that current practices in British Columbia were not unknown in England in recent times. He noted that the Committee had found that the methods of individual officers ". . . varied considerably from place to place; [that] some worked completely at random, some took a few names from each street or page of the electoral list, [that] some worked alphabetically through it. Some deliberately summoned from one area at a time, to make it easier to serve summonses and arrange travel. One whimsical solicitor revealed how, as an articled clerk left to do the summoning work for his principal, he used his power to remove the mother of a young lady whom he was courting from her watch-dog position at home."

[247] Use of a computer was recommended in the *Morris Report*, *supra*, note 235 at 73. There it was said that in making up a panel: "The fairest basis would be selection at random in the mathematical sense, which . . . means that the chance of any one individual being selected is no greater than that of any other individual. This could be achieved by the use of computers, which would have the added advantage of mechanising the clerical work involved in selecting and summoning jurors . . . ." Problems with a computer were encountered by the Sheriff's Department in the State of New South Wales: *see* Transcript of Minutes of Conference of [Australian] Sheriffs, Melbourne, 27 February 1979. It was said that the computer had "hiccoughed" and that it "came out with a list of people who had already [been] served some months before." A computer is used in Queensland: *see* Forgie, *supra*, note 244 at 535.

[248] Law Reform Commission of Saskatchewan, *supra*, note 238 at 7.

[249] *Criminal Code*, R.S.C. 1970, c. C-34, s. 532. He is entitled to see the panel 10 days before his arraignment.

[250] This practice is consistent with the recommendation of the Morris Committee, *supra*, note 235 at 79-80: "we think it is reasonable that the parties to a case should have the opportunity of examining the panel in advance so that they may decide which jurors if any they wish to challenge. (Hence the need to include on panels and ballot cards the addresses and occupations of jurors). But we *recommend* that legislation should make it clear that the right to inspect and be provided with copies of the panel should be confined to persons who are actually parties to a case and to their legal advisers . . ." Cornish, *supra*, note 243 at 43, suggests that the list should not contain the prospective juror's address: "By providing addresses, it . . . assists a person who wishes to make an improper approach to a juror. It is desirable in future that only the general area from which a juror comes be indicated, and that litigants see the panel only on the day of the trial."

[251] By the *Jury Act*, R.S.B.C. 1979, c. 210, s. 3.

(g) an employee of the Department of Justice or of the Solicitor General of Canada;

(h) an employee of the Ministry of Attorney General of the Province;

(i) a barrister or solicitor;

(j) a court official;

(k) a sheriff or sheriff's officer;

(l) a peace officer;

(m) a warden, correctional officer or person employed in a penitentiary, prison or correctional institution;

(n) blind, deaf or has a mental or physical infirmity incompatible with the discharge of the duties of a juror;

(o) a person convicted within the previous 5 years of an offence for which the punishment could be a fine of more than $2,000 or imprisonment for one year or more, unless he has been pardoned; or

(p) under a charge for an offence for which the punishment could be a fine of more than $2,000 or imprisonment for one year or more.

Section 4 disqualifies any person who is unable to understand, speak or read the language in which a trial is conducted. By section 12, no person can be required to serve on a jury for the two years next after having served as a juror on a trial. This provision may not operate to exempt persons who have been empanelled but have never served either because they are not drawn by lot or because they are challenged. Under section 29, however (and perhaps curiously), the sheriff must deliver a certificate of attendance and service to "a juror who has attended and served on a *panel*." What was intended, almost certainly, was "a person who has served as a juror on a trial" because (by section 12) only those persons may be exempted during the next two years. No one else would require a certificate.

Few problems appear to result from these provisions. The list of disqualified persons is clear enough and so it should be hard for the sheriff to go wrong. If he does, by empanelling someone who is not qualified, then he will be "indemnified" for the mistake, by operation of section 31 of the *Jury Act*, and his actions will not likely prove to be a sufficient ground of appeal.[252] Section 31 provides that:

> Every sheriff to whom the return of jurors is by this Act committed is hereby indemnified for empanelling and returning as a juror named in or taken from the list of jurors for the year in which he has been summoned, although the person may not have been qualified to serve as a juror for that year.

This is a curious provision. Without tracing its history, it is probably safe to say that it was designed to protect the sheriff against actions brought by unhappy unqualified jurors. But the use of the word "indemnified" raises the question: who is to provide the indemnity and in what manner? The provision would be better constructed were it to say simply that "no action shall be brought against a deputy who returns an unqualified juror."

Members of the staff of Crown Counsel have complained that deputy sheriffs in the Province who return panels of juries do not, either before drawing the lists or before trial, make independent inquiries to determine whether prospective jurors are disqualified by reason of clause (o) or (p) of section 3 (1). It seems to be the practice of the deputies in the Province, presumably for reasons of time and manpower, to rely on the unsworn statement of each person to whom a jury notice is sent that he or she is not disqualified.

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[252] *See The King* v. *Stewart*, (1932) 58 C.C.C. 358 (S.C.C.) and *Regina* v. *Rushton*, (1975) 20 C.C.C. (2d) 297 (Ont. C.A.).

It may be an offence under section 5 of the *Offence Act*[253] for a disqualified person to serve as a juror. Section 5 provides:

> A person who contravenes an enactment by doing an act that it forbids . . . commits an offence against the enactment.

The *Jury Act* does not expressly "forbid" a disqualified person from serving as a juror and so it might be successfully argued that no penalty may be imposed.[254] Thus, if it is desirable[255] to ensure that citizens who have recently been convicted of serious criminal charges or who face charges of a serious nature do not serve as jurors, then an appropriate offence provision should be added to the *Jury Act*.

As for the deputy sheriff who does not check qualifications himself, it appears that little can be done because the Act imposes no positive duty on him to ensure that unqualified persons are not empanelled. In England, where it has been settled beyond doubt that a disqualified person who serves as a juror commits an offence, it is not wrong for the police, in the discharge of their responsibility to enforce the law, to examine the panel and to use the facilities available to them to determine who may be disqualified.[256] But in British Columbia, where the offence is not clearly made out, it may be wrong for the sheriff to make the panel available to the police before trial. Legislative amendment is desirable so that deputy sheriffs know to whom they may make the papers available and at what times. Ideally, only parties and their lawyers should be entitled to receive the panel, but in order to limit the potential for harassment of, or improper advances to, prospective jurors, the panel ought not to be made available more than one or two days before trial. Professor Cornish's suggestion[257] that the panel not contain precise addresses, but neighbourhoods only, is a sensible one.

6. PERSONS WHO MAY BE EXEMPTED FROM JURY SERVICE

In 1585 in England, Parliament enacted a statute[258] "for returning of sufficient jurors, and for better expedition of trials," designed:

> . . . for reformation of abuses in sheriffs and other ministers, who for reward oftentimes do spare at home the most able and sufficient freeholders, and return the poorer and simpler sort, least able to discern the causes in question and most unable to bear the charges of appearance and attendances in such cases.

The statute must have had limited effect because in 1778 a summoning bailiff to the Sheriff of Middlesex was fined £200 and was committed until the fine was paid following his attachment on a charge of having demanded money from citizens to excuse them from serving as jurors. The report of the case is instructive:[259]

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[253] R.S.B.C. 1979, c. 305.

[254] *Quaere* where such a person would be entitled to payment under s. 22 of the *Jury Act*, R.S.B.C. 1979, c. 210.

[255] Cornish, *supra*, note 243 at 37 said: "A man with a criminal record may well have special reasons for failing to discharge his duty as a juror in an honest and disinterested way, and it is right that some convicted offenders should be excluded from service." In the Morris Report, *supra*, note 235 at 75, it is simply said that it is "essential" to learn who may be disqualified by reason of crime.

[256] *R.* v. *Mason*, [1980] 3 All E.R. 777 (C.A.) at 783-4, *per* Lawton, L.J., for the court: "The facts which have been revealed show that some scrutiny of jury panels is necessary if disqualified persons are to be excluded from juries. The police are the only authority able to do this. Since it is a criminal offence for a person to serve on a jury knowing that he is disqualified, for the police to scrutinise the list of potential jurors to see if any are disqualified is to do no more than to perform their usual function of preventing the commission of offences." In the Morris Report, *supra*, note 235, it was said at 75-6: "We wish to emphasize that we see no objection to the parties to a case, including the police, making such inquiries as are proper about the records of persons who have actually been summoned for jury service and whose names have been included in panels. Such information might well be desirable for purposes of the challenge . . . The procedure to which we object is that of asking the police to examine, in advance and as a general practice, the lists of those whom it is proposed to call for jury service, and our objection is that quite apart from the practical difficulties referred to, such a practice might be thought to amount to giving the police the power to select juries.

[257] *Supra*, note 243 at 43.

[258] 27 Eliz. I, c. 6 (1585); *see also* the description of "exaction and trickery in summoning jurors" contained in Morris, *supra*, note 11 at 279-80.

> Being examined upon interrogatories, it appeared to the Court upon the report of Sir James Burrow, that [the bailiff] admitted having received small sums from several individuals. That in some years he received in the whole about £60 or £70 per annum; and in every year something, though sometimes not more than £20. But he denied ever having demanded it, or having ever been guilty of partiality, either in excusing those who paid him, or in summoning those more frequently than he ought to have done, who refused to pay him. He swore he received it only as a Christmas-box, which had been customary; and in no other view whatever . . .

Some prospective jurors in British Columbia are specifically exempted by the *Jury Act*[260] from jury service if they wish to take advantage of the exemption. These are officers or persons "regularly employed in the collection, management or accounting of revenue under the *Financial Administration Act*,[261] and persons registered under the *Chiropractors Act, Dentists Act* or *Naturopaths Act*.[262] By section 6 of the *Jury Act*, persons over the age of 65 years must be exempted if application for exemption is made. Proof of age is required in practice.

Section 5 of the *Jury Act* provides a mechanism for other exemptions:

> (1) A person may apply to the sheriff to be exempted from serving as a juror on the grounds that
>
> (a) he belongs to a religion or a religious order[263] that makes service as a juror incompatible with the beliefs or practices of the religion or order; or
>
> (b) serving as a juror may cause serious hardship or loss to him or to others.
>
> (2) On an application for exemption the sheriff may, if he is satisfied that the applicant is entitled to the exemption, exempt the applicant from serving on the jury for which he is summoned or, if the sheriff is not so satisfied, he may refuse the exemption.
>
> (3) Where the sheriff refuses an application for exemption made under this section, the applicant may apply informally and without prior notice or proceedings to the court for exemption on the grounds on which he made the application to the sheriff and the court may exempt or refuse to exempt the applicant from serving on the jury for which he is summoned.

In 1965, the Morris Committee in England addressed the question of excusals:[264]

> We have received much evidence as to what should constitute "good reason" for excusal. Our attention has been called to various groups of persons, some of whom might have occasion to apply to be excused. They include workers in agriculture and other industries, especially at certain times of the year; owners or managers of one-man businesses; women with family responsibilities; students and trainees; people asked to perform jury service at a time when they have already arranged holidays or other important engagements; people living in remote areas, particularly during seasons when travelling to court may be difficult; and persons in those occupations and professions whose claim to be ineligible or entitled to excusal as of right we were reluctantly unable to endorse. No more can be said than that each application for excusal will have to be judged on its merits, and must depend on its own particular facts and circumstances.

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[259] *Rex* v. *Whitaker*, (1778) 2 Cowp. 752, 98 E.R. 1343.

[260] R.S.B.C. 1979, c. 210, s. 3 (2).

[261] S.B.C. 1981, c. 15.

[262] Respectively, R.S.B.C. 1979, cc. 50, 92 and 297. Curiously s. 15 of the first statute and s. 67 of the second also provide for the exemption.

[263] In England, membership in a religious order may not be a sufficient ground: *see, e.g., Practice Note*, [1973] 1 All E.R. 240. The same note suggests that a prospective juror's occupation may not entitle him to be excused, but in *R.* v. *Mason, supra*, note 256 at 781, the Court of Appeal recognized the practice of judges excusing from long jury trials those "for whom taking part in a long trial would be unusually burdensome." Undoubtedly self-employed business people (for example) would fall into that class.

[264] *Supra*, n. 235 at 78.

In British Columbia, the court services division has published no instructions for the guidance of deputy sheriffs in granting exemptions. Some measure of assistance in writing would be desirable so that differences in practice can be minimized. Complete elimination of differences cannot reasonably be hoped for.[265] It is suggested that the training program for deputies include clinical sessions during which participants are given the opportunity to apply their good judgment to hypothetical applications for exemption and after which there may be discussion about the propriety of the exercise of the discretion.[266]

There is no present requirement for the sheriff to draw to the court's attention those prospective jurors who have been excused. It is likely, however, that the sheriff, as an officer of the court, could be ordered to attend with his records in order to allay any anxieties about jury-packing.[267] It is not now the practice of the courts to demand that the sheriff explain his ground of refusal to excuse when a prospective juror takes his appeal to a judge under section 5 (3) of the *Jury Act*. There is no reason to suppose, however, that a court could not call on its own officer to make whatever explanations are felt to be necessary.

A deputy sheriff who accepted a payment for excusing a juror in British Columbia would likely be charged with an offence under section 9 of the *Sheriff Act*. That provision prohibits the director of sheriff services, a sheriff or any person acting under their authority from directly or indirectly demanding or receiving any reward not otherwise permitted for performing or not performing his duties.

7. CHALLENGES TO THE ARRAY[268]

In 1968, Professor Cornish wrote:[269]

> It is unlikely today that a litigant will wish to question the whole panel on the basis that the summoning officer has not made a disinterested selection, but if he does have such an objection then he may 'challenge the array.' The right is of great antiquity and was still being taken advantage of in the early nineteenth century. In one case in which a publisher was being charged with sedition, he was able to prove that the sheriff who summoned the jurors was a member of the association which had instituted the prosecution.[270] The old procedure on a challenge to the array was for two jurors to be selected as 'triers'; they would bear the allegations and decide whether the challenger had 'shown cause'. But in 1948 it was laid down[271] that the judge would hear and decide the issue.

In British Columbia, the array has recently been challenged in two criminal cases. Pursuant to section 559 of the *Criminal Code*, the presiding judge in each instance determined the challenge.[272] In the first case, *Regina* v. *Brass*,[273] the array was challenged under section 558 of the *Criminal Code*, which provides:

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[265] This truth was recognized in the Morris Report, *supra*, note 235 at 77.

[266] A suggestion for more education was made in P. Schulman and E.R. Myers, "Jury Selection" in Law Reform Commission of Canada, *Studies on the Jury* (1979) at 421-2.

[267] *See* the Morris Report, *supra*, note 235 at 66, for an English solution to the problem.

[268] 26 Hals. (4th ed.), para. 621 at 324 contains an accurate statement of the nature of a challenge to the array.

> Challenge to the array is exception taken to the whole panel of persons returned by the summoning officer by reason of matter personal to the officer himself. It is commonly divided into the following two classes:
> (1) principal challenge, where the summoning officer is in a position inconsistent with impartiality, as by being party to the action, related to one of the parties, having empanelled certain persons at the request of one of the parties or having an action pending against him by either party; and
> (2) challenge for favour, where the position of the summoning officer is not necessarily inconsistent with impartiality, but may be suspected.

In addition to Forgie, *supra*, note 244, *see*, on challenges to the array, I.A. Vannini, "Challenges to a Jury" (1973) 23 C.R.N.S. 57 at 59-61 and J.P. Eddy, "Challenges to Jurors" (1960) 229 L.T. 305.

[269] *Supra*, note 243 at 44.

[270] In an even more remarkable case mentioned in 2 W. Tidd, *The Practice of the Court of King's Bench and Common Pleas* (9th ed., 1828) at 906, a new trial was refused where ". . . the attorney for the defendant was the under-sheriff, who had the summoning of the jury.

[271] *Criminal Justice Act, 1948*, 12 & 13 Geo. VII, c. 58, s. 35 (2).

> (1) The accused or the prosecutor may challenge the array of petit jurors only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned.

No suggestion of fraud or wilful misconduct was made. As Mr. Justice Locke said:[274]

> . . . the motion is made almost outside the section and on more fundamental grounds. The grounds before me were that the wife of the Crown prosecutor is employed as a clerk typist in the sheriff's office and that she participated in the selection of the jury to the extent which I will relate. The facts show that this lady, by closing her eyes and opening the voter's list for two counties, selected at random approximately 150 names which she typed, which gave, if I can put it, the raw material from which a jury could be selected. She gave the list to the sheriff. During the following days it appears that there were a number of names on the list ascertained by the sheriff[275] or deputy sheriff to be absent, removed or some other difficulty. A final list of 71 individuals was typed by her in the course of sending subpoenas[276] and a number of these were returned, indicating that the selectee had removed. The lady had no power to excuse jurors. She did not purport to exercise any powers and she testified that during the course of her duties if anyone called in relation to the jury she would refer them to the sheriff who would make his decision.

It was not suggested that the prosecutor had tried to influence his wife or that the wife had done anything improper. Nonetheless, Locke, J. gave effect to the challenge, citing the necessity[277] to *ensure* (His Lordship's emphasis):

> . . . that justice must not only be done but seem to be done . . . If the judge feels there is a slightest ground whatsoever that any member of the bar or of the public or for that matter the court could think that there has been any interference with the selection of the jury, on which our liberties rest, then he should do something about it.

His Lordship concluded:

> I repeat again that in the instant case there is no evidence to show that the prosecutor or his wife have committed any impropriety or even thought about it. Nevertheless, in view of the sensitivity of the picking of the jury and the jealousy with which the Court has guarded this for the last 400 years, it is unwise in my opinion to expose the prosecutor, his wife or the sheriff to any suspicion whatsoever that there *might* be some connection between what I will call the administrative and enforcement side of the law, and the prosecutor. The prosecutor is, after all, an officer of the court. This alone obliges him, of course, and as he always has, to assist the court in every way and to ensure that no suspicion or the likelihood falls upon anyone.

This case illustrates both the way in which a court in this Province will proceed with the challenge (that is, without triers, but with *viva voce* evidence if necessary[278]) and the lengths to which a court will go to protect the integrity of the jury selection process. The decision exists as a reminder to all deputies in the Province of the importance of their duty in returning juries and of the need for them to be scrupulously correct at all times.

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[272] Presumably, "triers" should still be employed where the array is challenged in civil cases. There is no reason to suppose that the array cannot be challenged in a civil case on the authority of the common law, unless it could be said, as it has been said in Australia (*see* Forgie, *supra*, note 244 *passim*), that the discretion of the sheriff has been so truncated by legislation that there is no array to challenge. A court is unlikely to reach that conclusion in this Province in light of the breadth of the discretion given by section 7 to the *Jury Act*, R.S.B.C. 1979, c. 210. In any event, *see Smider* v. *Millar*, (1964) 50 W.W.R. 108 (B.C.S.C.), an instance of a civil case in which the principal array was challenged, though it was challenged under the *Jury Act*, R.S.B.C. 1960, c. 202. At the Conference of Australian Sheriffs in 1979, *supra*, note 195 at 60, it was said by one participant that there was "a fairly good feeling that there is no longer a challenge of the array." This remark prompted one of the Tasmanian representatives to reply: "Well, in our jurisdiction there is."

[273] [1981] 4 W.W.R. 657.

[274] *Ibid.* at 657-8.

[275] Undoubtedly, Mr. Justice Locke meant the senior deputy or the deputy in that community responsible for returning the jury, because the only sheriff in the Province at the time was at Victoria.

[276] Actually, "a notice in writing signed by the sheriff containing the particulars of the time and date of the sitting at which the juror is required to attend:" *see* s. 10 (1) of the *Jury Act*, R.S.B.C. 1979, c. 210.

[277] *Supra*, note 273 at 658-9.

In the second case,[279] the array was challenged on the ground that the panel was not representative of the community because, as the press report reads:[280]

> . . . it generally excluded young people who are missed during enumeration because of their age or transiency, and native Indians, many of whom live on reserves.

Chief Justice McEachern is reported[281] to have dismissed the challenge because ". . . selecting prospective jurors from the voter's list was a recognized and accepted practice." His Lordship was obviously not persuaded that the necessary partiality, fraud or wilful misconduct had been proven.

Undoubtedly, a deputy sheriff who acted criminally in returning a jury and whose array[282] is challenged successfully will be prosecuted for his wrong. It is an open question, if his conduct did not amount to a crime, whether he could be sued successfully in a civil action.

This discussion should not be concluded without observing that there seems to be no enactment which would permit anyone other than the sheriff to empanel jurors. That may be an unfortunate omission in a case where it is known that a deputy sheriff in a particular community is not indifferent, so that a challenge to the array would likely succeed. Historically, in such cases, the writ of *venire facias* was directed to the coroner and, if the coroner was not indifferent, to elisors.[283] In such cases now, the director of sheriff services should use his power of appointment.

8. TALESMEN

In criminal cases, by section 11 of the *Jury Act:*

> (2) Where an insufficient number of persons empanelled are in attendance at the sittings, the sheriff may summon the number of persons, whether qualified or not, necessary to complete the number of persons required.

These persons may, by subsection 3 of the same section, be summoned in writing or otherwise. This provision should be read in conjunction with section 571 of the *Criminal Code*, which provides that the court may order the sheriff to make up the deficiency and that he may do it by word of mouth if necessary. In civil cases, by section 16 of the *Jury Act:*

> (3) Where the sheriff is unable to summon all of the jurors selected for service or where any of the persons summoned fail to attend at the time and place for which they are summoned, the sheriff shall report the fact to the judge who may order the sheriff or other proper official to summon the number of persons, whether qualified jurors or not, necessary to make the number of persons required to serve on the jury; and those persons may, if necessary, be summoned by word of mouth or in writing at any time.

Thus, in civil cases but arguably not in criminal cases involving prosecutions under provincial statutes, the sheriff must await the order of the court before finding surplus jurors or talesmen. Historically a writ issued from the court to the sheriff when the panel was insufficient.[284]

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[278] In *Rex* v. *Dolby*, (1821) 1 Car. & K. 238, 174 E.R. 791, objection was taken to the adduction of the evidence of the sheriff on the ground that he was an incompetent witness because he was an interested person and a party to the issue. Abbott, C.J. at 792 thought, no authority having been cited on either side, that the safer course was to consider the witness to be incompetent, but he added: "I do not by any means say that he is so, and I wish that this may not be considered as a precedent, to be acted upon hereafter."

[279] *Regina* v. *Butler*, Supreme Court of British Columbia, New Westminster Registry, 18 January 1982.

[280] *See* W. Chow, "Accused Stay Silent During Trial" *The Vancouver Sun*, 19 January 1982, at A3.

[281] *Ibid.*

[282] Forgie, *supra*, note 244 at 531, says that to array a panel is to "arrange" or "order" it.

[283] *See* 3 Bl. Comm. 354-5. *See also* R. Nunez, "Elisors and the Reluctant Sheriff" [1950] 3 U. Fla. L. Rev. 194 and Forsyth, *supra*, note 228 at 142.

Professor Cornish has said,[285] of what was once called "praying a tales:"

> It is a rare occurrence for a court to find itself without enough jurymen. If it does happen, there is an ancient procedure known as 'praying a *tales*', by which the judge may command the summoning officer to select 'so many (in Latin, *tales*) of such other able men of the county then present' in the precincts of the court as are needed to make up the full number of jurors . . . The Morris Committee[286] has recommended that this surprising procedure, by which a man can find himself spirited out of the street and sworn on to a jury without warning, should be restricted: it should only be possible to make up a quarter of the jury in this way. This seems a fair balance of convenience. There must be some protection against the court having to close for lack of jurors, otherwise summoning officers will feel obliged to have ready a large number of reserve jurors who will have to waste a lot of time because of an unlikely chance.

In this country, the Law Reform Commission of Canada has preferred the convenience of citizens to the efficient operation of the courts. In its report on *The Jury* published in 1982, the Commission commented:[287]

> Under the present law, if so large a number of prospective jurors in a panel are successfully challenged that a full jury cannot be empanelled, section 571 of the *Criminal Code* permits the sheriff or other proper officer simply to summon any qualified person to act as a prospective juror in the case. The granting of a *tales*, as such a procedure is called, is in most cases a severe inconvenience to the persons summoned, who may simply have been going about their business in the street when encountered by the sheriff. Therefore, the proposed section provides that where an insufficient number of jurors is available to try a particular case, a new panel of prospective jurors should be summoned in the usual manner.
>
> We considered, but ultimately rejected, an alternative to our present recommendation. According to the alternative, where half or more of the prospective jurors necessary to constitute a jury had been selected before the panel was exhausted, those already selected were to be retained; only the remainder of the jury was to be selected from the next-summoned panel. Although this alternative recognized the importance of each individual selected for jury duty, it did not, in our opinion, take sufficient account of the delay which might be entailed in summoning a new panel and the consequent inconvenience to those prospective jurors already selected. In the result, we recommend the abolition of the practice of granting a *tales* but make no recommendations for an alternative procedure. The fact that the practice of granting a *tales* has virtually disappeared suggests to us that we need neither retain the procedure nor propose an alternative to it. We believe the most important safeguard against exhausting the panel to lie in summoning a large enough panel to preclude the possibility of its being exhausted.

It may be that in time, in most criminal cases, tales will no longer be prayed. Consideration ought to be given to the question of whether securing talesman is still a justifiable practice in civil cases as well.

It seems plain from a reading of sections 11 and 16 of the *Jury Act* that in British Columbia talesmen may be found anywhere and that the sheriff is not restricted to finding them within the precincts of the court.[288] In *Regina* v. *Solomon*,[289] the question was raised but not answered whether under the English legislation the sheriff could go out into the street to find talesmen. The same case stands for the proposition that there can never be a complete jury of talesmen and that in the unlikely event that a panel is completely exhausted before a single juror is seated, then the proper course is for the court ". . . to require the sheriff to return a further panel instanter."[290]

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[284] *See* 3 Bl. Comm. 364. The origin of talesmen in civil cases seems to be 35 Hen. VIII, c. 6 (1544); and in criminal cases 5 Mar., c. 7 (1558).

[285] *Supra*, note 243 at 42.

[286] *Supra*, note 235 at 110-11.

[287] At p. 50-51.

[288] But they must not be selected from a "private and arbitrarily arranged list:" *see Smider* v. *Millar, supra*, note 272 at 112, although that case was decided under an earlier statute. The sheriff had prayed a tales by selecting names from a list he kept of persons (at 109) " . . . who have indicated to the sheriff that they are available for duty as jurors, presumably on occasions when the sheriff prays a tales."

[289] [1958] 1 Q.B. 203 (C.C.A.) at 207.

It seems that the array of the tales can be challenged. In *Rex* v. *Dolby*,[291] two triers found in favour of a challenge of the tales on the ground that one of the sheriffs who had made the tales was a subscriber to a society by whom the prosecution of Dolby had been instituted. Since it is wrong for a sheriff to return a tales after the *venire* has gone to the coroner, a challenge could also be made in such an instance.[292]

9. CARE OF THE JURY

(a) Food and Drink

In other days, when members of a jury left the courtroom to consider their verdict, they were kept together under the eye of the sheriff or his bailiff without meat, drink, fire or candles until they reached their decision.[293] Blackstone reports[294] and *Harebottle* v. *Placock*[295] confirms that if food or drink were taken by jurors at their own expense, they were "fineable," but their verdict was good. If they were fed by or took refreshment from the party for whom they gave their verdict, the verdict was void.

In this Province today, jurors who have been sent to consider their verdict are fed and lodged at public expense until their decision is made. Whether jury verdicts in criminal cases to which the provincial Crown is a party could be voided on this account is an open question. The *Jury Act* provides that jurors are to be paid their reasonable travelling and lodging expenses, but nothing is said about reimbursement for food. In practice, jurors must buy their own liquor. Undoubtedly, the sheriff, as the courts' officer, has a duty to ensure that no one over-imbibes.

(b) Guarding the Jury

As the officer of the court charged generally with the responsibility of preserving the security of the courthouse and its precincts,[296] the sheriff is obligated to ensure that jurors are protected from attack not only as they sit in the jury box but when they move as a segregated body to restaurant or hotel during breaks from their deliberations.[297] But the sheriff must not only protect them from physical attack. He must also endeavour to ensure that no juror, once sequestered with his fellow jurymen, is interfered with by any person. It is desirable for him to endeavour to ensure that no juror communicates at all with members of the public.[298] The sheriff himself must of course not attempt to influence any member of the jury in any way at all.[299] If he does so, he may be prosecuted under section 127 (2) of the *Criminal Code*, disciplined by the court or tried summarily for contempt.[300]

Reports are heard from time to time of deputy sheriffs who have repeated to members of the public, including members of the staff of Crown Counsel, what they have overheard said by jurors who are in their charge. Any such repetition, if proved, would certainly earn the censure of the court and might well result in a fine or committal of the offender for contempt. On this score, it is perhaps enough to quote the authors of the Morris Report, who spoke about the dangers attendant upon disclosure by jurors themselves of what may have passed between them:[301]

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[290] *Ibid.*

[291] *Supra*, note 278.

[292] *Corn* v. *Paslow*, Cro. Eliz. 894, 78 E.R. 1117.

[293] *See* the Morris Report, *supra*, note 235 at 99. *See also Saunders* v. *Freeman*, (1561) 1 Plowd. 209, 75 E.R. 321 at 323-4; *Mounson and Wests Case*, (1588) 1 Leon. 132, 74 E.R. 123 (figs and pippins); *Harebottle* v. *Placock*, (1604) Cro. Jac. 21, 79 E.R. 17, *and see* "Payment of Jurymen" (1948) 206 L.T. 179 and "Juries and Jurymen of the Past," (1955) 220 L.T. 33.

[294] 3 Bl. Comm. 375.

[295] *Supra*, note 293 at 22.

[296] *See* the discussion of this responsibility in Chapter VI.

[297] Jurors in civil cases and (usually) jurors in criminal cases are not segregated until they have been charged. For a discussion of the separation of jury members, *see* Mr. Justice Barry, "On the Segregation of Jurors" (1955) 6 Res Judicatae 139.

> It has sometimes been suggested that there is no need to require jurors not to disclose what happened during their deliberations . . . we agree with those of our witnesses who argued that if such disclosures were to be made, particularly to the Press, jurors would no longer feel free to express their opinions frankly when the verdict was under discussion, for fear that what they said later might be made public. In fact they might even fear reprisals from criminals for whose commitments they were responsible, and who had heard about their deliberations. We think there is much force in this argument . . .

Before leaving the subject of care of the jury, it is useful to mention the case of *In re the Sheriff of Surrey*.[302] There, the sheriff asked Mr. Justice Blackburn for an opportunity to pay a compliment to the men who attended as grand jurors. Blackburn, J. said that it was not necessary to do so. The sheriff rose in any event and began to speak. The judge asked him to stop. Nonetheless the sheriff persisted, whereupon the judge placed his hand on the sheriff's shoulder and asked him to sit down. The sheriff still persisted and for his persistence, Blackburn, J. fined him £500. And still the man persisted. It was only when the judge threatened to commit him for contempt that the sheriff took his place in silence. Later he apologized to the court and at that time, Blackburn, J. is reported to have ". . . stated that he had no personal feeling, but must protect the dignity of the Court, and could not allow any improper interruptions to the business of the assize." In British Columbia (whether as a consequence of this decision or not), it is the invariable practice of judges of the courts to thank the jury members for performing their public duty. The thanks have been known to be curtly given when the judge has felt the verdict to be perverse.

10. PAYMENT OF JURORS

A person sitting as a juror at a trial is entitled to receive payment for his necessary and reasonable travelling and lodging expenses together with a fee. The fee to be paid depends on the length of the trial. A person who is empanelled but who is not selected to sit as a juror is entitled to a fee in a smaller amount.[303] It is the duty of the sheriff to ascertain and approve the travelling and lodging expenses[304] and to make a pay list for the jurors summoned to attend a sitting or a trial, in the form prescribed by the Attorney General.[305]

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[298] *E.g.*, *Regina* v. *Masuda*, (1953) 106 C.C.C. 122 (B.C.C.A.), where the jury was guarded by two policemen who had been Crown witnesses on the case and had been joined at lunch by a third policeman who was said, at 123, to have been "a Crown witness of some importance." A new trial was ordered because of the suspicion which might arise of any taint attaching ". . . to the proper and meticulous fairness which must always surround the administration of public justice" (at 124); *Regina* v. *Davis*, (1960) 44 Cr. App. Rep. 235, where a conviction was quashed in part because a shorthand reporter entered the jury room after the jurors had been segregated, and in which it was said, at 24: "For anybody to enter the jury room once the jury has been enclosed is, of course, to the highest degree improper, unless it be by order of the court;" *Regina* v. *Alexander*, [1974] 1 W.L.R. 422 (C.A.) where it was said to have been an irregularity for a jury member to leave the jury room unescorted to fetch an exhibit, and at 426, in which it was said that once segregated, jurors ". . . must remain in the charge of the court through the bailiffs throughout;" and *Regina* v. *Goodson*, [1975] 1 W.L.R. 549 (C.A.), where an appeal against conviction was allowed because a juror had left the jury room to place a telephone call.

[299] *See*, *e.g.*, *Regina* v. *Gilson*, (1965) 4 C.C.C. 61 (Ont. C.A.), where it was said to have been irregular for the sheriff without orders from the court to enter the jury room and answer a question with what, at 64, "purported to be a legal opinion."

[300] *See* the Morris Report, *supra*, note 235 at 113.

[301] *Ibid.*

[302] (1860) 2 F. & F. 234, 175 E.R. 1038.

[303] *Jury Act*, R.S.B.C. 1979, c. 210, s. 22 (1) and (2).

[304] *Ibid.* s. 22 (4).

[305] *Ibid.* s. 23.

CHAPTER IX

WHO SHOULD ADMINISTER WHAT THE SHERIFF DOES?

In 1980, a deputy sheriff in British Columbia failed to act on a warrant of execution because the business premises of the debtor were closed during the deputy's working day and because approval for overtime work had been suspended by sheriff services. What these facts disclose about the deputy's ignorance of a rudimentary rule of execution law[1] is interesting enough, but it is not as interesting as what is disclosed about the power of the executive to control the enforcement of an order of the court — however unwittingly. The case in point was not a case in which the government was a party to the litigation or in which the government was even interested, but it serves as an example of what could be done when political interests are at stake. The question, of course, is the question of judicial independence.

In 1934,[2] the Court of Session in Scotland decided the question of whether an employee of a county council could be appointed as a sheriff's officer to work full time executing warrants issued by a court in the council's favour. An objection to the appointment was taken and the objection was sustained on the appeal. In the course of his reasons for judgment, Lord Sands said:[3]

> The enforcement of diligence[4] by departmental officials, whether national or local, would seem to be an extension of the tendency, recently emphatically condemned by the Lord Chief Justice of England, to the intrusion of the bureaucratic into the realm of the judicial.

And later:[5]

> As the Supreme Court in Scotland, I think it to be our duty, in so far as may be within our power, to secure that, not only our own officials, but those of all subordinate Courts, shall be free and independent of the control of any administrative body.

These comments are no less applicable in British Columbia today than they were in Scotland 50 years ago. Yet what Lord Sands said has, for some, a strange echo of earlier times and some judges in this Province seem resigned to the bureaucratic intrusion. There have been developments in this Province which are intended to ensure that the voice of the judges in the administration of the courts is not entirely lost. Thus, section 14 (2) of the *Supreme Court Act*[6] now provides:

> Subject to the direction of the Attorney General, and to the direction of the Chief Justice in matters of judicial administration, the chief administrator of court services[7] shall direct and supervise facilities, registries and administrative services for the court.

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[1] *See* the discussion of the sheriff's powers of entry on execution in Chapter VII. In short, the sheriff may break into premises which could not be said to be a dwelling-house.

[2] In *Stewart* v. *Reid*, 1934 S.C. 69.

[3] *Ibid.* at 75.

[4] "Diligence is the Scottish legal term denoting the measures (such as arrestments of wages or poindings and warrant sales) which can be taken to enforce civil court decrees ordering the payment of debts or the implement of other legal obligations and includes also measures to secure property pending a court action, *viz.* arrestments and inhibitions on the dependence. Its main purpose is to compel people to pay the debts which they have incurred and which the courts have ordered them to pay." *See* Scottish Law Commission, *First Memorandum on Diligence: General Issues and Introduction* (Memorandum No. 47), October 1980 at 1, footnote 2.

[5] *Supra*, note 2 at 75. In the colony of British Columbia, where the sheriffs were "fees" sheriffs, there was an early call for their control by the executive. In *The Cariboo Sentinel* (published at Barkerville), for 5 August 1865, under the heading "No Sheriff," at 3, it was said, because of "the most serious inconvenience and it may be loss" that had resulted from the lack of a sheriff that: "[T]he time has arrived when Sheriff's derectly [sic] responsible to the Executive should be appointed in the several districts of the country."

[6] R.S.B.C. 1979, c. 397.

[7] Who is for now at least also the director of sheriff services.

A sub-section to the same effect also appears in the *Court of Appeal Act*[8] and in the *Provincial Court Act*.[9] These provisions undoubtedly reflect the influence of the Chief Justice of British Columbia, The Honourable N. T. Nemetz, who has been Chief Justice of both superior courts in British Columbia and who has over the years been a persistent advocate of the need for the judges to administer the courts. The quoted provisions provide a measure of guarantee of judicial independence, but as the example of sheriff services will demonstrate, they do not secure independence as it should be secured.

Three general comments about the provisions should be made. First, it seems unclear whether a direction from a Chief Justice or from the Chief Judge on a matter of judicial administration will bind the administrator of court services if a direction of a different kind on the same "matter" is given by the Attorney General.[10] The use of the word "and" in the second phrase of the provision set out above may give the Chief Justices and Chief Judge a veto power but it gives no independent authority. This interpretation is consistent with section 13 of the *Supreme Court Act* and section 35 (1) of the *Provincial Court Act* which makes the Attorney General responsible[11] for the "provision, operation and maintenance of court administrative services, facilities and registries."[12]

Second, "matters of judicial administration" are not defined by statute. In practice, they are worked out by negotiation as questions arise. One matter of "judicial administration" which has emerged is superintendence of the court lists. The provision of security for the courts has also been negotiated in this way — although not entirely to the satisfaction of some of the judges. The lack of complete satisfaction illustrates that inclusion in the Acts of reference to matters of "judicial administration" is no more than a half-measure. The provisions do not secure judicial independence. On the contrary, they suggest that independence is something which must be bargained for, that is, that any powers the Chief Justices or the Chief Judge have are acquired by executive concession. As a proposition of custom or of law or of necessity, the idea of executive fiat is insupportable[13] and has been since the time of Queen Anne. As Chief Justice Laskin, Chief Justice of the Supreme Court of Canada, said in a recent speech to the Annual Meeting of the Canadian Bar Association:[14]

> What this imported, as it evolved over the years, was the separation of the executive and the judiciary; no admixture of the one with the other; no mixture of the judiciary in politics or political controversy; correspondingly, no intermeddling of the executive with the judiciary; each branch was to be independent of the other, left alone to carry on its separate duties.

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[8] S.B.C. 1982, c. 7, s. 31 (2).

[9] R.S.B.C. 1979, c. 341, s. 35 (2).

[10] By the *Attorney General Act*, R.S.B.C. 1979, c. 23, the Attorney General is at the same time bound (s. 2 (c)) to "superintend all matters connected with the administration of justice in the Province not within the jurisdiction of the government of Canada" and (s. 2 (i)) "has the regulation and conduct of all litigation for or against the Crown or any ministry in respect of any subjects within the authority or jurisdiction of the legislature." Conflict of interest is inevitable, though it has never been suggested (outside the Legislative Assembly at least) that any recent Attorney General has discharged his responsibilities other than in accordance with the highest standards of the legal profession.

[11] Here is enshrined the democratic principle of accountability. That principle is discussed more fully later in this chapter.

[12] Curiously, perhaps because of the influence of Chief Justice Nemetz, who is now Chief Justice of the Court of Appeal, there is no similar provision in the *Court of Appeal Act*, S.B.C. 1982, c. 7.

[13] *See, e.g.*, the extract from Sir J. Fox, *The History of Contempt of Court* (1927) at 203, which is quoted in Chapter VI, *see* text at note 141. In the quoted passage, Fox claimed the inherent right for courts "to insist on the provision of a roof to keep out the weather and suitable furniture and the required officers." *See also Harding* v. *Pollock*, (1829) 6 Bing. 25, 130 E.R. 1189 (H.L.), where, at E.R. 1196, Littledale J. described the right of courts to appoint their own officers where the executive has not done so for them.

[14] At Toronto, September 1982. Unpublished. *See also* the very forceful remarks of Mr. Justice Estey, also of the Supreme Court of Canada, in "Who Needs Courts?" (1981) 1 Windsor Yearb. Access To Justice 263 at 278-9. Of course the need for further steps to secure judicial independence is the theme of the report made by Chief Justice Deschenes to the Canadian Judicial Council: *see Independent Judicial Administration of the Courts*, (1981).

Third, there is some doubt about whether the Chief Justice of the Supreme Court of British Columbia has authority under section 14 (2) to issue directions concerning "matters of judicial administration" in the County Courts of the Province. There is no provision in the *County Court Act*[15] equivalent to section 14 (2), although the Chief Justice, who has general supervision of the judges of the County Courts,[16] in practice speaks for those courts when matters of administration arise. It is arguable whether a power to supervise the judges of a court includes the power to direct the way in which that court should be administered generally. If section 14 (2) were not itself objectionable, it would seem desirable to suggest that a similar provision be included in the *County Court Act*, with the intention that the Chief Justice of the Supreme Court should have the power to issue directions about administration, following consultation with any administrative judges he may have designated for the various County Courts.[17]

As recently as 1885 — and that is recent history for the sheriff — Maitland could say[18] that "[i]f a sheriff does not obey a writ, he is liable to be punished in a summary fashion, for the High Court keeps a tight hold over him." The court had certainly kept a tight hold over sheriffs in the exercise of their other responsibilities, as the sheriff of Surrey discovered when he interrupted court proceedings and when he purported "as chief officer of the county" to "open" the court in the face of a judicial order that it be cleared.[19] More recently, an Australian judge who had made his own arrangements for a view admonished the sheriff for, without authority, calling out the police to provide protection.[20]

Control over deputy sheriffs is not often exercised by judges in the courts of British Columbia today. There is little doubt that the judges are generally reluctant to make a show of authority. In Vancouver, a recent disciplinary problem involving a deputy sheriff was referred by a judge to the director of sheriff services. In Terrace, complaints to a judge about delay and neglect in the service and execution of process were passed to the district manager.

To some extent, the disinclination of judges to use their disciplinary power is understandable, particularly when so many of the problems in sheriff services stem from staff shortages, for which no single deputy or manager, or even the director, can be held responsible. But from another perspective, the judges' reluctance to act with powers which they undoubtedly have can be seen as an abdication of their responsibility to assert the right of the judiciary to independence. The Scottish Law Commission has put it nicely in the context of the sheriff's duties on execution:[21]

> A reformed system should not simply leave it to debtors to complain to the courts; it is for the courts to act positively and of their own accord to ensure that standards of conduct are maintained.

The commissioners explain why:[22]

> The understandable reluctance or failure on the part of debtors to challenge sheriff officers' actings by raising actions of damages, together with the expense and uncertainty of damages actions for wrongful diligence make the remedy an

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[15] R.S.B.C. 1979, c. 72.

[16] *Ibid.* s. 8.

[17] He has the authority to make the designations under s. 9 of the *County Court Act*, *ibid.*

[18] *See* F.W. Maitland, *Justice and Police* (1885) at 71.

[19] *See In re The Sheriff of Surrey*, (1860) 2 F.& F. 234, 175 E.R. 1038.

[20] It was a judge in the State of Victoria. *See Minutes of a Conference of [Australian] Sheriffs*, Melbourne, Victoria, 27 February 1979, at 138-9.

[21] *Fifth Memorandum on Diligence: Administration of Diligence* (Memorandum No. 51), October 1980, at 41, para. 3.33

[22] *Ibid.* at 93, para. 6.7.

> imperfect safeguard for debtors and an inadequate substitute for supervision and control by the courts.

Another good reason for active judicial control has been advanced by several local lawyers who must contend with dissatisfied clients. Their complaint is captured in a submission made to the Scottish Law Commission by the Law Society of Scotland:[23]

> Litigants, who have gone to court, as they supposed, 'to recover damages', 'to get their property back', or 'for maintenance', find it odd that the Court takes no part in, and has no responsibility for, the part of the procedure that most concerns them, namely the enforcement of their decrees. And one can understand that.

The power of the courts over their own officers and the use the courts are prepared to make of those powers are of course related questions. The point is debatable, but it seems to be more than a mere coincidence that the emergence of a public service sheriff's office has been accompanied by a general reluctance on the part of the judges to use the disciplinary powers. This is not to say, necessarily, that there was not an equal reluctance when "fees" sheriffs were the rule. But it should be pointed out that even with the legislative "guarantees" of participation, some members of the judiciary seem content (particularly as far as sheriff services is concerned) to allow their powers to be swallowed up by the new system of executive court administration.[24]

Of course this whole discussion turns on the question of whether it could be said that the courts in British Columbia are not truly independent because the possibility exists under current legislation that a deputy sheriff, though an officer of the court, will feel compelled to take his orders from the Attorney General and not from the judges. The Ontario Court of Appeal recently stated, in *Regina* v. *Valente*[25] (a case of considerable notoriety) what it conceives to be the test of determining whether a tribunal is an independent tribunal. The test was stated this way: "What would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude?"[26] It is suggested that such an informed person would conclude that a court is not truly independent if it must, to ensure that its authority and integrity is maintained, fine or commit to jail an innocent person as a result of a decision by Cabinet which has the effect, probably unintended, of frustrating the court's purposes and so of frustrating the obtention of justice.[27]

How best should sheriff services be administered having regard to the overriding need for the appearance and for the fact of independent courts?

Deputy sheriffs might be organized on the pattern of the salaried court bailiffs of the County Courts in England. There, the Lord Chancellor appoints a registrar in each district[28] who is responsible, among other things, for the execution of all warrants and orders issued or received by the court.[29] The registrar is liable for wrongs resulting from his own acts and defaults and for loss occasioned by the acts and defaults of the bailiffs appointed by the Lord Chancellor[30] to help the registrar with the job.[31] The bailiffs are themselves liable for "neglect, connivance or omission"[32] and may be ordered to pay damages to the complaining party following a summary hearing.[33]

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[23] *First Memorandum on Diligence*, *supra*, note 4 at 17, para. 1.35.

[24] Only one of the judges who responded to enquiries expressed the opinion that the administration of sheriff services was properly a matter for the judiciary.

[25] (*No. 2*) (1983) 41 O.R. (2d) 187; 145 D.L.R. 452. On appeal to the Supreme Court of Canada.

[26] At D.L.R. 468. This test was drawn from the decision of the Supreme Court of Canada in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369, in which the court was asked to decide whether "a case had been made out of reasonable apprehension of bias."

[27] Undoubtedly the same problem exists wherever there are public servant sheriffs. For example, the Transvaal correspondent wrote to say that ". . . the registrar, Sheriff and deputy sheriff in the Country are all officers of the Court, and, *with very few exceptions*, take their orders from the Court only." (emphasis added)

[28] *County Courts Act, 1959*, 7 & 8 Eliz. II, c. 22, s. 21 (1). Significantly, each registrar must be a solicitor of at least seven years' standing.

[29] *Ibid.* s. 120.

[30] Under s. 28 (1), *ibid.*

[31] *Ibid.* s. 163.

There are two advantages to this plan. First, the Lord Chancellor, as the senior judge in England, has some control over the number of bailiffs who will be employed. Section 28 (1) of the *County Courts Act, 1959* provides that His Lordship may:

> . . . with the concurrence of the Treasury as to numbers and salaries, appoint in connection with any court such . . . bailiffs . . . as he considers necessary for the purpose of carrying out the work of the court. . . .

Obviously this provision does not yield absolute control over the number of people who will be employed to do the work of execution and in fact the provisions may give nothing more than what this Province's Chief Justices have in practice as the product of negotiation. But the provision is both a recognition that the decision about numbers is the Lord Chancellor's, as opposed to that of the Treasury, and that it is not a decision of the executive around which the Chief Justices must negotiate. It is a clear legislative statement that the number of officers to be employed is a matter of what in British Columbia would be called "judicial administration."

The second advantage offered by the scheme of *County Courts Act, 1959* is that summary hearings may be held to deal with complaints made against bailiffs. It has been said already in this paper that the Supreme Court of British Columbia may exercise the power of summary hearing as an element of its inherent jurisdiction.[34] There is merit, however, if only because it reminds everyone that the power exists, in providing for such hearings by statute. Certainly a statutory addition to the *Sheriff Act*[35] giving all judges in every court in the Province power to discipline their officers for "neglect, connivance or omission" would answer those who suggest that the judges of the Provincial Court or, arguably, of the County Courts, do not have the disciplinary power.

Despite these advantages, the English County Court solution is not one which should be adopted in this Province. A strength but also the weakness of the English plan lies in the powers given to the Lord Chancellor. His Lordship will, of course, be sensitive to the needs of the judiciary, but he is at once judge and cabinet minister, and so he will inevitably feel the pressure of his colleagues in the executive, no matter how incorruptible he may believe himself to be and no matter how worthy his reputation. The point is a simple one. Even in the body of the Lord Chancellor, there is no complete assurance that the judges will be free to do what they think they must or that their orders will be executed.[36]

It is in order to ensure accountability that section 28 (1) of the *County Courts Act, 1959* requires Treasury concurrence with the Lord Chancellor's decision about the number of bailiffs to employ. In any democracy, of course, accountability is almost everything. There is evidence of the emphasis laid upon accountability in remarks made to the Legislative Assembly of this Province by the Attorney General in 1980. In his remarks, the Attorney General stressed the importance of independence of the judiciary, but linked it to accountability:[37]

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[32] *Ibid.* s. 164 (1).

[33] *Ibid.* s. 164 (2).

[34] *See* the discussion of the disciplinary power and of the power to fine and commit for contempt in Chapter VI.

[35] R.S.B.C. 1979, c. 386.

[36] Chief Justice Deschenes shares this opinion that the English model ought not be adopted in Canada: *see* his comment at 103, in *The Sword and the Scales* (1979).

[37] (1980) 3 *Debates of the Legislative Assembly for British Columbia* 1199.

> . . . I am pleased to state that throughout the court services division there is the fullest appreciation by all those whose daily tasks bring them into association with the judiciary that it is their paramount duty[38] to conduct themselves in a manner which assures that the judges whom they serve may discharge their independent judicial responsibilities in the justice system so as to provide the highest standard of service possible for those persons who require its attention, yet administer the effective accountability measures which the development of the system demands.

On the quesion of accountability, it is important to note that in Scotland, independent, entrepreneurial firms[39] of sheriff's officers execute diligence under the general supervision of the sheriffs principal[40] — who are judges. There is no "accountability" to the Parliament at Westminster in the sense that we know it. The Scottish Law Commission recently confronted the problem in its *Fifth Memorandum on Diligence*:[41]

> It has to be recognised that where the activities of officers of court are subjected to scrutiny and debate in Parliament, difficulties can arise with respect to ministerial responsibility. These difficulties are not, however, insuperable. The sheriffs principal have long possessed administrative functions of various kinds and the Court of Session has always exercised rule-making functions in respect of civil procedure. These functions come under Parliamentary scrutiny or political debate from time to time and any difficulties caused by the absence of direct ministerial responsibility appear to be overcome.

That seems to be a short and full answer to the accountability argument.

Nor is it desirable that sheriff services should be re-structured on the model of an enforcement office like that proposed in England by the Payne Committee[42] and like that which has functioned in Northern Ireland since 1969.[43] There are obvious advantages to a centralized means of enforcement, but for British Columbia, a solution that is limited to execution, as an enforcement office would be, is unhelpful when the reform of the whole of sheriff services is being considered. In this Province, sheriff services obviously does more than just execute court orders, so that any "model" for administration of the service must take account of the other jobs that the deputies do, such as process-serving, jury empanelment and provision of security for the courts. Moreover, an enforcement office does not answer the questions which are at the heart of this chapter: who should provide daily supervision of the officers of the court and who should administer the way in which the orders of the courts are enforced? In England, the proposed enforcement office was to be a court,[44] as it is in Northern Ireland,[45] for whose administration the Lord Chancellor was responsible.[46] But the protections offered by the Lord Chancellor for the independence of the judiciary courts in England are founded in a tradition of which British Columbia is only in part a beneficiary.

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[38] It is not clear from inquiries made that all the employees understand the scope of the paramount duty. Only recently, for example, when striking telephone workers picketed the Provincial Court building in Vancouver, deputy sheriffs talked about walking off the job. They only remained in their offices after learning that it was one of their own number who had summoned the management telephone employee whose presence had provoked the picketing.

[39] Scottish Law Commission, *Fifth Memorandum on Diligence*, *supra*, note 21 at 28, para. 3.7.

[40] *Ibid.* at 32-6, paras. 3.15-3.18.

[41] *Supra*, note 21 at 8-9, para. 2.4.

[42] *Report of the [Payne] Committee on the Enforcement of Judgment Debts* Cmnd. 3909 (1969) at 95, para. 338.

[43] *See Judgments (Enforcement) Act (Northern Ireland) 1969*, 18 Eliz. II, c. 30.

[44] *Report of the [Payne] Committee*, *supra*, note 42 at 95, para. 341: ". . . the Enforcement Office should enjoy all the attributes of an ordinary court of law constituted as part of the judicial hierarchy of courts and tribunals and would be separate from, and independent of, the administrative and executive machinery of government." *See also* para. 342 at 96.

[45] *Judgments (Enforcement) Act (Northern Ireland) 1969*, *supra*, note 43.

[46] *Report of the [Payne] Committee*, *supra*, note 42 at 101, para. 366; *Judgments (Enforcement) Act (Northern Ireland) 1969*, *supra*, note 43, Part II.

The solution[47] recommended for adoption in British Columbia is that the discharge of all court duties[48] by deputy sheriffs should be administered by a council, over which the Chief Justice of the Supreme Court of British Columbia would preside and to which each of the other courts in the Province would send a representative.[49] There should be no lay representation on the council and there should be no representative from the Ministry of Attorney General. The council would supervise sheriff services and would answer directly and only to a special all-party committee of the Legislative Assembly. The council or its representative[50] would meet the committee annually and would at that time submit its budget for the ensuing year.[51] The committee would be empowered to inquire into the budget generally and would be required to recommend either its acceptance or its rejection to the Legislative Assembly. Neither the members of the council nor its representative should be compellable before the Assembly for the purposes of discussion or review of the budget.

Crown duties now discharged by deputy sheriffs would be transferred to special officers in each of the Ministries for whom the responsibilities are performed. A new cross-Ministry class of Crown officers is probably unnecessary in light of the absence of any real demand for officers.

Tied to this recommendation is a proposal that the council consider whether it would not be desirable to return to a system of "fees" sheriffs in British Columbia, either on the Scottish or on the English High Court model.

Many lawyers in the Province are dissatisfied with the way in which the sheriff goes about his work and many of them have simply ceased to use the sheriff when it is lawful for them on their clients' behalf to use someone else. The Crown now employs the police to serve subpoenas where quick action is necessary. These developments are ironic in light of the expressed *raison d'être* for the growth of sheriff services.

A return to a system of entrepreneurial sheriffs is not unworkable just because there is a labour union in this Province whose members' interests must be borne in mind.[52] Appropriate legislation or rules can be drafted to ensure that the union members are guaranteed reasonable notice or are assured of being taken on by other government departments where they are not able to secure employment with a fees sheriff.

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[47] The idea for this "model" comes from Professor C. Baar, Associate Professor of Politics, Brock University, St Catharines, Ontario. In a paper entitled "The Future of Judicial Independence and Judicial Administration" read to the Annual Meeting of the Canadian Judges Conference at Montreal in August 1980, Professor Baar described 12 models of court administration. One of the "judge-controlled" models was defined this way: "Administration is the responsibility of judges who direct an office or department responsible directly to the legislature (the ombudsman model)." Professor Baar did not, however, suggest how the "model" would work in practice. The idea of a "council" to which reference is made in the text here is borrowed from the Ministry of the Attorney General [Ontario], *White Paper on Courts Administration* (1976). The advantage of the model is, as Professor Baar says, that it provides the judges with "a source of income independent of the government budget."

[48] Included here are the "mixed responsibilities of process-serving, jury empanelment and escorting, but not "witness management," which goes beyond service of process and includes making arrangements to accommodate witnesses when they come from other places to give their evidence in court. That kind of work should be done for the Crown in criminal and civil cases by Crown officers and not by officers of the court.

[49] It is suggested that the council be comprised of one member from each of the four court levels in order to ensure that no court will have more influence than any of the others and to ensure that all decisions are consensual, and not by majority vote. These recommendations answer Professor Baar's criticism of the proposed Ontario council, which was to have been composed of seven people, four of whom were superior court judges. Professor Baar, *supra*, note 47, had said that: "[t]he council's composition is therefore fraught with the possibility that priorities will focus on the top of the system rather than on the lowest levels of the judicial hierarchy." It was that level, he said, that was "often most in need of management." The proposals for membership made here will promote accountability within the council: each judge will present recommendations for his court which are likely to be accepted by the other judges. In an extreme case, where the four judges could not agree on a budget, "majority" and "minority" budgets could be submitted. It should go without saying that the judges themselves will not prepare the budget but will rely on the experience of professionals who will be employed to assist them. As Chief Justice Deschenes mentioned in his study, *supra*, note 14 at 50, " . . . there is no reason in principle why the Canadian judiciary could not undertake to manage the existing court staff and budget . . . "

[50] The representative could be a "commissioner" as suggested by Chief Justice Deschenes in his study for the Canadian Judicial Council, *supra*, note 14 at 41.

[51] If council members themselves meet the committee it is desirable that the meeting and any inquiry that follows should be held behind closed doors. It would be unseemly to require the judges to expose themselves to cross-examination in public. The public will not be denied its opportunity to challenge what the judges propose because the recommendation of the special committee can be debated fully in the Legislative Assembly. The prospect of public debate of the recommendation will, of course, provide an incentive for the judges to agree on a responsible budget.

This suggestion that it may be desirable to return to a system of entrepreneur sheriffs is strengthened by the knowledge that in 1974 there were no strong reasons in evidence for changing the system of "fees" sheriffs then in effect. A public service sheriff's office was created on a large scale not because it was thought that the "fees" sheriffs were not doing the job properly (although there is some suggestion that they were not[53]), but purely for reasons of political expediency — as part of a promise to policing agencies that a pool of people would be made available by the Crown to do things policemen had been doing, so that the police could concentrate on fighting crime.[54]

A return to a system of entrepreneur sheriffs in this Province is desirable for reasons of economy. There is no doubt amongst the legal profession in British Columbia that the court's writs would be executed more expeditiously and efficiently by "fees" sheriffs than they now are by the public servants. And at least one of the public servants — a manager in sheriff services — acknowledges that documents are served much more quickly by "fee-for-service" process servers employed by sheriff services for the purpose than are documents left with ordinary staff to be served. It is very simply a question of incentive. That question has been addressed specifically by the Scottish Law Commission:[55]

> . . . it has been strongly represented to us that independent contractor officers are likely to be more speedy and efficient in the execution of citation and diligence, and more ready to undertake the difficult jobs, than salaried officers would be. Independent contractors are subject to the pressures of competition as well as to sanctions for negligence or delay, and have incentives which motivate them to work hard. It has been argued that salaried officers in the Scottish Court Services would not have the same incentives and motivation. . . . We would not venture to predict that a fall in standards of efficiency would necessarily occur, but it can at least be said that there is no guarantee that the present standards would be maintained.

An English study suggests that French huissiers de justice, who are not supported financially by the government, are able to make adequate livings enforcing judgments.[56]

One principal advantage to be found in a return to a system of entrepreneur sheriffs is that it will mean that the government will no longer have to bear the burden of the expenses of enforcement. Clearly, some allocation will have to be made in the judicial budget to ensure that money is available to the "fees sheriff" to supply deputies to serve process, to guard the judges and to escort prisoners. Those with judgments which require enforcement should not have to ensure proper service, the security of courts or the presence of prisoners. But adequate controls over expenditures out of the judicial budget will exist under the plan recommended in this chapter.

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[52] *See* the discussion of labour relations in Chapter III. On the question of whether a system of "fee" sheriffs is desirable, it is worth mentioning that Mr. N.R. Whitty of the Scottish Law Commission, wrote to say that:

> . . . the pressure for change [to a system where independent contractors are not used] springs partly from a feeling that enforcement officers having coercive powers should be fully accountable to a disciplinary authority, partly from a feeling that such officers should not make a profit out of the misfortunes of the poor, and partly from a feeling that a system of payment by fees gives officers a financial incentive to execute enforcement even in inappropriate cases. There is likely, I think, to be widespread opposition on the part of the debtors' or consumer lobby, and perhaps also Labour MPs and local authority councillors, to the preservation of the independent contractors system [which was what the Commission recommended] even with the new controls outlined in our Memoranda.

The Memoranda are the *First* and *Fifth Memoranda*, *supra*, notes 4 and 21 respectively.

[53] At least not as well as they might have had they been legally trained: *see* the remarks about qualifications in Chapter III.

[54] This information comes from a former ministry official who participated in the creation of sheriff services. *See also* "Sheriff Slated for a Comeback," *Victoria Times*, 26 August 1974, at 5; "Three Deputy Sheriffs Learning Court Duties," [Victoria] *Daily Colonist*, 17 September 1974, at 19; "Meet the Sheriff," *Victoria Times*, 27 June 1978, at 9; and "Sheriffs: Peace Officer Image Doesn't Fit Stereotype," *The [Kamloops] Daily Sentinel*, 29 December 1979, at 3.

[55] *See*, *First Memorandum on Diligence*, *supra*, note 4 at 107, para. 4.15.

[56] D.F. Martin, *Study of the Profession of Huissiers de Justice* (1980) at 211. Indeed, Mr. Martin has called the French profession "prosperous:" *see* "A Comparative Study of Enforcement in England and France" (1982) 1 C.J.Q. 219 at 222.

A system of "fees" sheriffs would also shift the cost of negligence by sheriffs and deputies from the government to the sheriffs themselves.

What advantages can be expected to flow from the creation of a council such as that suggested here? The answer to this question is simple: the courts, through the council, and subject only and ultimately to the Legislative Assembly, would have control over their own officers. Control is important in order to ensure that all suggestion of Crown interference with the judiciary will be eliminated.[57] Under the proposed scheme, the courts would determine the number of officers they needed, would set those hours of work which would ensure that the work of the courts that had to be done was done, and would ensure that the work was done as effectively as it could be done. Because the officers would be responsible directly and only to a sheriff who would be responsible ultimately to the judges, there would be a greater incentive to perform diligently than there now is under the present more diffused system. Moreover, under the proposal, those who know how their orders should be enforced would be responsible for the appointment, training, supervision and discipline of the officers who do the work of enforcement.[58]

This proposal for a council is more likely to be acceptable to everyone than are any of the other solutions that have been suggested. It could be adapted to encompass all officers of the court (except lawyers, of course, who have their own historical claims to independence) and it would be easy to implement. Only one other change would be necessary. Section 62 (c) of the *Supreme Court Act*[59] now contemplates the formulation of rules regulating the duties of officers of the court. These rules at present are to be made by the Lieutenant Governor in Council. This provision should be amended to ensure that the courts and not the executive have the power to make the rules.[60]

What can be said against the proposal that the courts assume responsibility for the administration of sheriff services? It may be that no change is necessary if the premise about the importance of judicial independence is rejected. It could be said that the suggestion really only substitutes one bureaucracy for another. That is true as far as it goes, but what is important is not whether another bureaucracy exists; what is important is who controls it. Equally, there is no merit in the criticism that judges have no management expertise. They need have no more experience in administration than the Attorney General or any other minister of the Crown is expected to have now. It is not suggested that the council should not place administration in the hands of competent managers. It is important only that the judges should be in a position to supervise the work of their officials directly and that the judges should be able to act swiftly and forcefully when necessary. Others might argue that the proposal takes no account of the necessity to make someone liable for wrongful acts and omissions. Obviously the judges themselves should not be liable; there have been and always will be strong reasons for their immunity. But that does not mean that the officers themselves should not be held responsible in appropriate circumstances, that is, in those cases where they have acted outside the scope of the order or warrant or writ directed to them or where they have breached the rules established at common law and by statute for the proper execution of their duties. As noted earlier, they can insure themselves against their own defaults.

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[57] In 1981, the then Attorney General was quoted in a newspaper as having said: "I don't think there is any trouble with the line being drawn between the executive branch and judicial branch. The only place we come together with the judiciary is in provision of facilities, personnel and services so they can function," *see The Vancouver Sun*, 8 April 1981 at H7. But the point is that the courts may *not* be able to function as they should if there are too few pencils or too few sheriffs.

[58] On the question of appointment, organization and control of sheriff's offices in Scotland, *see generally*, Scottish Law Commission, *Fifth Memorandum on Diligence*, *supra*, note 21, Part III at 21-46, paras. 3.1-3.41.

[59] R.S.B.C. 1979, c. 397.

[60] The model provided by s. 12 of the *Attorney General Amendment Act, 1982*, S.B.C. 1982, c. 46, which amended the *Court Rules Act*, R.S.B.C. 1979, c. 77 is not sufficient because it provides only that the judges should be consulted before any rule change is made and does not require that their proposals be accepted.

The proposal contained in this chapter should ensure that two things do not happen, namely: (a) a collapse of the system by which the courts administer justice, resulting from executive control over the way in which orders of the court are enforced; or (b) an unfortunate and perhaps devastating clash between executive and judiciary if the judges of the courts had to assert their claim to independence over the issue of whether they should have the means to ensure that their orders will be enforced.

The problem of conflicting orders between the *legislature* and the courts seems to be an insoluble one, at least under present constitutional arrangements. There is an English case of exceeding interest. It followed on the well-known decision in *Stockdale* v. *Hansard*.[61] There, the court had upheld a claim of Parliamentary privilege where an action in defamation was brought for things said in a publication "printed by and under orders from the House of Commons."[62] In a second action,[63] judgment for the plaintiff was awarded and a *fi.fa.* was issued to the sheriff, who eventually sold goods of the defendants Hansard under a writ of *venditioni exponas*. The House of Commons then declared that execution had proceeded in contempt of the privileges of the House and ordered that the money levied by the sheriff be returned to "Messrs. Hansard."[64] No money was paid as ordered, and as a result the sheriff was committed by the House to the custody of the Sergeant.[65] The plaintiff thereupon pressed his case forward in the courts and obtained a rule *nisi* for an attachment against the sheriff on the ground that the sheriff had not paid the plaintiff the money levied on the execution.[66] Lord Chief Justice Denman made the rule absolute and in doing so said:[67]

> It is suggested that, under these painful circumstances, we cannot truly say that a contempt has been committed by not paying the money. I say, without any hesitation, that, if this were a mere penal proceeding, I should think it an act of the utmost injustice to inflict anything like punishment on these gentlemen: their conduct does them honour; and all persons are bound to brave such consequences as may be brought upon them by obedience to the law of the land. But the question is, whether the plaintiff has not a right to call upon the sheriff to pay over to him the money which that officer holds to his use. He has as much right to that money as any member of either House of Parliament has to his estate. We, having put the law in motion are bound to enforce it for him: and there is, unfortunately, no other mode of doing so than the proceeding now suggested. It is said that the sheriff may be hindered from performing the duty by physical force. Without casting any reproach upon these gentlemen, and thinking it quite natural that they should wish to have the direction of this Court in every step of their proceedings, yet if that support could be purchased by a delay which was so far a postponement of the discharge of their duty, I must still say that the individual for whom they are

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[61] (1839) 9 Ad. & E. 1, 112 E.R. 1112

[62] *Ibid.* at 1153, *per* Lord Denman CJ

[63] "[F]or another publication of the same report." *see Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (19th ed., 1976) at 188 *and see* H. Broom, *Constitutional Law*, (2nd ed., 1885), at 958. It may be that this was *Evan's and Wheelton's Case*: *see* May's *Treatise* at 139

[64] Broom, *ibid.* at 959

[65] May, *supra*, note 63 at 188 and Broom, *ibid.* at 959

[66] Broom, *ibid.* at 959

[67] Broom, *ibid.* at 959-60

> trustees is not to suffer by their taking a prudential course in that respect. It is suggested, now, that the law cannot be carried into effect without exposing others to the inflictions to which these gentlemen have been subjected. I trust that will not be the case. But, whatever the consequences may be, this is a mere civil process to enable a party to a cause tried in this Court to obtain his rights; the Court has no discretionary power.

The likelihood of similar events happening in these times is small, but the perspicacity which the Lord Chief Justice displayed is to be admired and emulated. Two things may be learned from His Lordship's difficult decision. First, an independent judiciary can deal with any problem, of any magnitude. Second, sometimes the law is no help at all.

APPENDICES

Appendix A

SHERIFF ACT
R.S.B.C. 1979
CHAPTER 386

Interpretation

1. In this Act

"director" means the director of sheriff services;

"process" includes a writ, petition, warrant or order issued under the seal of the court, a judge's summons or order, a notice, subpoena and other proceeding at law or otherwise.

Staff

2. (1) There may be appointed, pursuant to the *Public Service Act*, a director of sheriff services, sheriffs, deputy sheriffs and other employees considered necessary to carry out their duties under this or any other enactment.

(2) Subject to the minister's approval, the director, and a sheriff authorized in writing by the director, may, notwithstanding the *Public Service Act*, appoint persons on a temporary or part time basis to act as sheriffs for particular purposes specified in their appointment and, where a person is appointed for the purpose of serving a document, notwithstanding the *Financial Administration Act*, the director may authorize a sheriff to pay the person appointed a fee from money received by the sheriff for service of the document.

Duties of director

3. (1) The director is responsible to the minister for the administration of this Act, for the direction of sheriff services generally and for the establishment and maintenance of programs for the selection and training of sheriffs and other persons appointed under this Act.

(2) The minister or director may designate a person to act as director during the director's absence.

(3) The director is a sheriff.

Jurisdiction

4. The director and each sheriff has jurisdiction throughout the Province to exercise all the powers and perform all the duties imposed on him under this or any other enactment.

Officer of court

5. A sheriff is an officer of all of the courts in the Province.

Only sheriff to serve

6. No person other than a sheriff or a person appointed under section 2 (2) shall serve or execute a judgment summons, an order of committal or writ or warrant of execution issued in respect of a civil matter.

Solicitor responsible for sheriff's costs

7. A solicitor or other agent whose name appears on any process served by a sheriff is responsible to the sheriff for the fees and expenses of service or execution.

Costs in advance

8. A sheriff is not required to effect execution or seizure under any process unless, where demanded by him, all reasonably anticipated costs of the process are first paid to the sheriff, or an undertaking satisfactory to him is given by the person initiating the process.

Bylaw document fees

8.1 Where a sheriff serves a document issued under a municipal bylaw, the municipality shall pay the sheriff a prescribed fee.

Offence

9. (1) No director, sheriff or other person acting under the authority of the director or a sheriff shall directly or indirectly

(a) demand or receive any reward for performing or not performing his duties except as permitted by this or any other enactment; or

(b) acquire any property disposed of under execution by a sheriff.

(2) A person who contravenes this section commits an offence and is liable on conviction to the penalties provided under the *Offence Act*.

Employee to post bond

10. The minister may require a person employed for the purposes of this Act to post a bond pursuant to the *Bonding Act* for an amount and in a form he considers appropriate.

Regulations

11. The minister may make regulations.

APPENDIX B

DEEMED JUDGMENTS

There are a number of circumstances in which a creditor may take execution proceedings against his debtor's property without having obtained a "judgment" in the usual sense.

For example, each of a plaintiff who has discontinued his action before it was set for trial and a defendant who has withdrawn his defence is liable to other parties in the action for their costs up to the time of discontinuance or withdrawal. There is no provision for and it is not desirable that there should be an order of the court to that effect. The liability for costs is imposed by Rule 36 (4) and (5) of the Rules of Court. The costs may be taxed under Rule 57 and when they are, the taxing officer must issue a certificate for them under Rule 57 (25). The certificate "may be entered as an order of the Court and enforced in the same manner:" Rule 42 (50). Quite apart from Rule 42 (50), it should operate *like* an order: *see Boltom* v. *Boltom*, (1876) 3 Ch. D. 276.

There are also "statutory" judgments. Some provincial and federal statutes permit certain people or bodies, usually the Crown, to issue certificates against "debtors" setting forth amounts payable by statute which have not been paid as required. The certificates may be "produced to" or "filed" with one of the superior courts in the Province and when they are they become enforceable by the usual means of execution. Some of the enactments in British Columbia which authorize this procedure are: *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 94 (a taxed bill); *Coal Act*, R.S.B.C. 1979, c. 51, s. 29 (4) (royalty money due to the Crown); *Corporation Capital Tax Act*, R.S.B.C. 1979, c. 69, s. 41 (taxes due and payable); *Employment Standards Act*, R.S.B.C. 1979, c. 107.1, s. 12 (wages owing); *Gasoline (Coloured) Tax Act*, R.S.B.C. 1979, c. 151, s. 16 (taxes due and payable); *Gasoline Tax Act*, R.S.B.C. 1979, c. 152, s. 15 (taxes due and payable); *Gasoline Tax Act, 1958*, R.S.B.C. 1979, c. 153, s. 13 (taxes due and payable); *Home Purchase Assistance Act*, R.S.B.C. 1979, c. 172, s. 13 (principal, interest, taxes, costs, deferred loan and expenses payable); *Hotel Room Tax Act*, R.S.B.C. 1979, c. 183, s. 19 (taxes due and payable); *Human Rights Code*, R.S.B.C. 1979, c. 186, s. 17 (costs ordered by board of inquiry); *Income Tax Act*, R.S.B.C. 1979, c. 190, s. 30 (judgment or order in "actions" under s. 28); *Insurance Premium Tax Act*, R.S.B.C. 1979, c. 205, s. 22 (tax due and payable); *Logging Tax Act*, R.S.B.C. 1979, c. 248, s. 31 (tax due and payable); *Mineral Land Tax Act*, R.S.B.C. 1979, c. 260, s. 12 (delinquent mineral land tax); *Mining Tax Act*, R.S.B.C. 1979, c. 267, s. 31 (taxes due and payable); *Mobile Home Act*, R.S.B.C. 1979, c. 281, s. 53 (taxes due and payable under listed statutes); *Motive Fuel Use Tax Act*, R.S.B.C. 1979, c. 285, s. 19 (taxes due and payable); *Offence Act*, R.S.B.C. 1979, c. 305, s. 72 (unpaid fine); *Social Service Tax Act*, R.S.B.C. 1979, c. 388, s. 21 (taxes due and payable); *Taxation (Rural Area) Act*, R.S.B.C. 1979, c. 400, s. 36 (taxes due and payable); *Tobacco Tax Act*, R.S.B.C. 1979, c. 404, s. 18 (taxes due and payable); *Workers Compensation Act*, R.S.B.C. 1979, c. 437, s. 45 (assessment owing).

The statutes are not consistent in the way in which the mechanisms of enforcement are made available. For example, the wording is different in each of the three provincial *Acts* under which certificates are most frequently issued. It is on these certificates which the sheriff is most commonly called to act. In s. 113 of the *Employment Standards Act*, "on filing the certificate shall be enforceable as a judgment or order of the County Court or the Supreme Court." In s. 21 of the *Social Service Tax Act*, "when filed the certificate shall be of the same force and effect, and all the proceedings may be taken on it, as if it were a judgment of the court for the recovery of a debt in the amount stated in the certificate against the person named in it." In section 45 of the *Workers Compensation Act*, the certificate "when filed becomes an order of that court and may be enforced as a judgment of the court."

There is no appropriate reason for the differences in wording. It may not matter that there are differences, because in each case it seems evident that the intention of the legislature was to make available to these summary statutory "judgments" the courts' processes of execution. Still, in only one statute — the *Workers Compensation Act* — is it made clear not only that the usual means of execution are to be available, but that the certificate, when filed, actually becomes an order of the court. In all other enactments, it is likely that the certificate is something less than a judgment or order, even after it has been filed: *see, e.g., In re a Bankruptcy Notice*, [1907] 1 K.B. 478 (C.A.) and *Re Amalgamated Transit Union Division No. 101-134 and Ken Mar Handi Cabs Ltd. et al.*, (1972) 23 D.L.R. (3d) 220 (B.C.S.C.). These cases stand for the proposition that something is not a judgment if it is "to be enforced in the same manner as a judgment" or if it is to be enforced "as if it were a judgment." *But see, contra, Crossland et al.* v. *The Board of Education of the Medstead School Division No. 64 of Saskatchewan*, [1979] 5 W.W.R. 453 (Sask. Q.B.). If the English and British Columbia decisions correctly state the law, then Form 42 of Appendix A to the *Rules of Court* should be amended to require statutory creditors to attach their "certificate" in those cases in which the certificate is not an order.

Another problem with certificates which are not quite orders is that the sheriff's responsibilities when he is called upon to execute the writ are unclear. Does he have the same responsibilities to the Court, when a writ is founded on a certificate which is not an order of the Court, that he has when the writ has issued on an order in the ordinary course of litigation? Probably the responsibilities are the same. The statutes invite the creditor to make use of the methods of enforcement which can be used where judgment of a court has been pronounced. The methods are those for which provision is made in Rule 42 of the Rules of Court and in Rule 1900 of the *General Rules and Orders* of the Federal Court of Canada. The writs mentioned in Rule 42 are the *court's* writs, issued and sealed by the Registrar (Rule 42 (14)), who is an officer of the County Courts (*see County Court Act*, R.S.B.C 1979, c. 72, s. 39 and of the Supreme Court of British Columbia (*see Supreme Court Act*, R.S.B.C. 1979, c. 397, s. 16). The form of the writ of *fieri facias* in proceedings of the Federal Court of Canada issued is in the name of the Chief Justice of the Court and is signed by one of the Court's Registry officers: *see, e.g.*, Form 56 in the Appendix to the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10. *See also Pattison* v. *Tingley*, (1861-63) 10 N.B.R. 553 (S.C. *en banc*), *per* Ritchie J. during argument at 555: "The execution is the act of the Court, though practically it is issued by the attorney." It should therefore make no difference whether a writ was issued on a certificate or on an order. Once the writ is issued, whether it is by statutory or by judicial authority, it is subject to the jurisdiction of the court and to all the powers which jurisdiction implies. If this is wrong, then section 5 of the *Sheriff Act* should be amended to provide that the sheriff is responsible as an officer of the court regardless of the origin of the "judgment" he is directed to execute.

There is a final point to be made about "certificates." Some deputy sheriffs have indicated that they pose special problems. This is not only because they yield more writs than do the judgments of the courts. It is because the certificates are summarily issued. Deputies frequently find themselves interviewing debtors who insist that they have paid all or part of what is claimed or that things are not as the writ suggests. Often the assessments are estimates only and often debtors do not use the opportunities open to them to challenge the calculation of what is owed. Of course, the deputies must execute the writs as they find them and are protected by the writs from actions brought against them for doing so. But there seems little sense in making the job of the deputies more awkward than it need be.

The Law Reform Commission of British Columbia in its Report on the Crown as Creditor: Priorities and Privileges (LRC 57, 1982 at 69) made the following recommendation with respect to these "deemed judgments."

> 9. Where the Crown or any public body is entitled to enforce a claim for the payment of money by means of a filing that confers upon the document filed the status of a judgment, the document should only be accepted for filing if it is endorsed with a statement that a copy of the document has been sent by registered mail to the debtor at the last address for the debtor according to the records of the Crown or public body.

In this way at least, debtors will have less about which they can legitimately complain.

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